Supreme Court, U.S.
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No. 94-___

IN THE

Supreme Court of the United States

October Term, 1994

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

v.

PFIZER, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where it appears that the Third, Seventh and Ninth Circuits would have reached a different result, did the Sixth Circuit err when it held that, because they had not been granted formal status as intervenors, unnamed class members who objected to the certification and approval of the settlement of a class action under Fed.R.Civ.P. 23(b)(3) had no standing to appeal *any* order entered by the district court, including an order denying their Fed.R.Civ.P. 60(b)(3) motion challenging the approval of the settlement, and seeking to establish fraud and misconduct in the procurement of the settlement's approval?

2. Where neither the Notice To The Class ordered by the district court, nor the manner in which the district court conducted the Fairness Hearing proceedings it convened to consider whether it should approve the settlement of a Rule 23(b)(3) class action *even suggested* that the grant of intervention under Fed.R.Civ.P. 24 was a condition for unnamed class members to participate in the proceedings or to appeal final orders entered by the district court that determined the rights of the class members, did the Sixth Circuit err when it dismissed for lack of standing the appeal of the denial of a Rule 60(b)(3) motion filed by unnamed class members who had actively participated in the Fairness Hearing proceedings as objectors, and who had been treated by the district court and all parties implicitly as parties or *de facto* intervenors?

3. Where the district court denied a motion filed by unnamed class members under Fed.R.Civ.P. 60(b)(3) while another motion of the unnamed class members filed under Fed.R.Civ.P. 59(e) seeking reconsideration of the district court's denial of their motion to intervene under Fed.R.Civ.P. 24 was still pending and undecided, did the Sixth Circuit err in dismissing the appeal of the denial of the Rule 60(b)(3) motion on the ground that the class members had not intervened, and in refusing to remand to the district court for a decision on the outstanding Rule 59(e) motion?

PARTIES TO THE PROCEEDING

In addition to petitioners Elizabeth Ridgeway, Rosemary Grunsby, and Fred Grunsby, each of whom appeared as Class Members-Appellants in the Sixth Circuit proceeding, respondents Arthur Ray Bowling, *et al.*, appeared as Plaintiffs-Appellees and respondents Pfizer, Inc. and Shiley Incorporated appeared as Defendants-Appellees before the Sixth Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	12
I. There Is A Deep And Confusing Split In The Circuits As To Whether Unnamed Class Members Of A Settlement Class Certified Under Fed.R.Civ.P. 23(b)(3) Must Formally Move And Be Permitted to Intervene In Order To Appeal Final Orders Affecting Their Interests	12
II. This Case Presents Two Important Questions Of Federal Law That Have Not Been, But Should Be, Decided By This Court	19
A. The Intervention Requirement Unduly Limits Objecting Class Members' Rights To Appeal	19
B. The Intervention Requirement Greatly Increases The Burdens On Litigants And The Courts	23
C. A Class Member Bound By A Rule 23(b)(3) Settlement Should Be Permitted To Appeal The Denial Of A Motion Filed Under Rule 60(b)(3) Alleging Fraud And Misconduct In The Procurement Of The Class Settlement	25
III. The Decision Dismissing Petitioners' Appeal Violated Their Right To Due Process And Is Such An Extreme Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision	26
CONCLUSION	29

TABLE OF AUTHORITIES

Cases: Page

Ace Heating & Plumbing Co., Inc. v. Crane Co., 453 F.2d 30 (3d Cir. 1971) 13, 14

Afro American Patrolmens League v. Duck, 503 F.2d 294 (6th Cir. 1974) 22

Alaniz v. California Processors, Inc., 73 F.R.D. 269 (N.D. Cal. 1976) 22

American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) 24

Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980) 13

Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993). 13, 18, 27

Bowling v. Pfizer, 143 F.R.D. 141 (S.D. Ohio 1992) .. passim

Bradley v. Milliken, 828 F.2d 1186 (6th Cir. 1987) 21, 22

Carlough, et al. v. Amchem, 5 F.3d 707 (3d Cir. 1993) .. 12, 13, 18

Cohen v. Young, 127 F.2d 721 (6th Cir. 1942) ... 6, 9, 17, 27

Croyden Assocs. v. Alleco, Inc., 969 F.2d 675 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993). 13, 15, 18, 23

Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295 (9th Cir. 1981) 14

Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044 (2d Cir. 1982) 25

Evitts v. Lucey, 469 U.S. 387 (1985) 28

General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982)..... 20, 21

Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993)... 12, 13, 15

Meyer Goldberg, Inc. v. Goldberg, 717 F.2d 290 (6th Cir. 1983) 21

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987) 13, 15, 16, 23

In re Cement Antitrust Litig., 688 F.2d 1297 (9th Cir. 1982), *aff'd,* 459 U.S. 1191 (1983) 14

In re Dennis Greenman, 829 F.2d 1529 (11th Cir. 1987) . 16

In the Matter of VMS Ltd. Partnership Sec. Litig., 976 F.2d 362 (7th Cir. 1992) 12, 13, 14

International Tank Terminals, Ltd. v. M/V Acadia Forest, 579 F.2d 964 (5th Cir. 1978) 22

Kem Mfg. Corp. v. Wilder, 817 F.2d 1517 (11th Cir. 1987) 25

Khan v. Shiley, Inc., 217 Cal. App. 3d 848, 266 Cal. Rptr. 106 (4th Dist. 1990), *review denied,* 1990 Cal LEXIS 1952 (May 3, 1990) 11

Lindsey v. Normet, 405 U.S. 56 (1972) 20

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) ... 28

Loran v. Furr's/Bishop's Inc., 988 F.2d 554 (5th Cir. 1993) 15

Marino v. Ortiz, 484 U.S. 301 (1988) 17, 18

Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977) 14

Patterson v. Stovall, 528 F.2d 108 (7th Cir. 1976) 13

Pennzoil Company v. Texaco, Inc., 481 U.S. 1 (1987) 28

Phillips Petroleum v. Shutts, 472 U.S. 797 (1985) 27

Research Corp. v. Asgrow Seed Company, 425 F.2d 1059 (7th Cir. 1970) 13, 14, 27

Sertic v. Cuyahoga Lake, Etc., Carpenters District Council, 459 F.2d 579 (6th Cir. 1972) 6, 9, 17, 27

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Shults, et al. v. Champion International Corporation, 1994 WL 509053 (6th Cir. 1994) 12, 16, 17, 26

Southerland v. Irons, 628 F.2d 978 (6th Cir. 1980) 26

Taylor v. Shiley, Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division (Philadelphia) February Term, 1986, No. 2087 ..... passim

Wade v. Goldschmidt, 673 F.2d 182 (7th Cir. 1982) 21

Walker v. City of Mesquite, 858 F.2d 1071 (5th Cir. 1988)..... 15, 16, 18, 23

Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324 (5th Cir. 1982) 15, 22

Wright v. Pfizer, CA. No. 91-58 (E.D. Ky. March 18, 1991) 3

Statutes and Rules:

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 1291..... 20, 28

28 U.S.C. § 1332..... 1

Fed. R. Civ. P. 23..... 11, 15, 17, 20, 21

Fed. R. Civ. P. 23(b)(1) 13

Fed. R. Civ. P. 23(b)(2)..... 13, 15, 16

Fed. R. Civ. P. 23(b)(3)..... passim

Fed. R. Civ. P. 23(c)(2).....1, 16

Fed. R. Civ. P. 23(e)..... 1, 12, 20, 22

Fed. R. Civ. P. 24 ..... 2, 9, 21

Fed. R. Civ. P. 24(a)..... 10

Fed. R. Civ. P. 24(b) 10

Fed. R. Civ. P. 59(e)..... 10, 11, 26, 27

TABLE OF AUTHORITIES – *(Continued)*

Statutes and Rules: Page

Fed. R. Civ. P. 60(b) ..... passim

Other Authority:

Timothy A. Duffy, *The Appealability of Class Action Settlements by Unnamed Parties,* 60 U. Chi. L. Rev. 933 (1993) ..... passim

James W.M. Moore, 3B *Moore's Federal Practice,* ¶ 23.80[5] (Matthew Bender, 1993) 14, 27

N.E. Paolini, *Recent Development: Walker v. City of Mesquite: The Nonappealability of Class Action Consent Decrees by Non-named Class Members,* 63 Tul. L. Rev. 1732 (1989) 18

Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions,* § 1.04 (McGraw Hill, 3d ed. 1992) 14

Charles A. Wright, *et al.,* 7B Federal Practice and Procedure, § 1797 (West, 2d ed. 1986) 14, 27

Charles A. Wright, *et al.,* 7B Federal Practice and Procedure, § 1799 (West, 2d ed. 1986) 22

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit dismissing petitioners' appeal is reproduced in the petitioners' appendix at 1a (there is no official citation to this order).

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1994. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition arises out of the procedures employed by a district court in its certification of a class and approval of a settlement of a class action certified under Fed.R.Civ.P. 23(b)(3) involving 50,000 to 100,000 heart-valve implantees who reside all over the world.[1] Petitioners are unnamed class members who complied fully with the district court's order notifying them of the steps to take to object to, and participate in the "Fairness Hearing" the court convened under Fed.R.Civ.P. 23(c)(2) and (e) to consider the approval of the class certification and settlement that had been proposed by the parties. In keeping with the court's order and established Sixth Circuit precedent, petitioners did not move formally to intervene in the case prior to the district court's decision approving the settlement. Moreover, the district court did not require petitioners to intervene and accepted their compliance with its order as sufficient for petitioners to have standing to file briefs, take discovery, introduce evidence and participate in the Fairness Hearing the same as the named parties. When petitioners appealed the district court's

1. The district court had jurisdiction pursuant to 28 U.S.C. § 1332. For the Court's convenience, copies of the district court's opinion approving the settlement, is reported at 143 F.R.D. 141 (S.D. Ohio 1992). This petition does not seek review of the merits of that decision, but rather of the Sixth Circuit's order dismissing petitioners' appeal for lack of standing of the denial of a motion filed under Fed.R.Civ.P. 60(b)(3) that challenged the approval of the class action settlement on grounds of fraud and misconduct by the proponents of the settlement in the procurement of the approval.

order certifying the class and approving the settlement, the Sixth Circuit issued an unpublished order dismissing their appeal on the ground that, because the district court had not formally granted petitioners the status of intervenors under Fed.R.Civ.P. 24, they lacked standing to appeal. 7a. This contradicted the Sixth Circuit's own prior published decisions, and deepened an already vast split among the federal circuits with respect to the question presented in this case — *i.e.*, whether unnamed class members who respond to a notice from the court inviting them to participate in Fairness Hearing proceedings concerning a proposed class certification under Rule 23(b)(3), and a proposed settlement, must intervene in order to have standing to appeal final orders entered by the district court that determine their rights as unnamed class members.

Petitioners are Elizabeth Ridgeway and Rosemary Grunsby, who were included in the class definition because both had implanted in them "Bjork-Shiley" heart valves manufactured and distributed by respondents Pfizer, Inc. and its wholly owned subsidiary, Shiley Incorporated (collectively, "Pfizer"), and because Fred Grunsby is the husband of Rosemary.

Approximately five years before this instant federal action was filed, petitioners had instituted their own lawsuit against Pfizer as the named plaintiffs in a class action in a Pennsylvania state court seeking compensatory and punitive damages against Pfizer on behalf of a class of implantees with a nexus to Pennsylvania. *Taylor v. Shiley,* Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division (Philadelphia) February Term, 1986, No. 2087. The *Taylor* case is still pending in the Pennsylvania court, but it is in suspense awaiting the outcome of the instant federal action.

The *Taylor* action is significant because, whereas Pfizer had succeeded in obtaining dismissals of similar heart-valve cases in other state law jurisdictions on various common law grounds, the court in *Taylor* had upheld petitioners' causes of action for fraud, intentional infliction of emotional distress, and breach of warranty under Pennsylvania law. *See Bowling,* 143 F.R.D. at 147. Thus, unlike class members in the *Bowling* case whose claims would be governed by adverse state law decisions of their

own jurisdictions, the members of the Pennsylvania class in *Taylor* were well situated to obtain recoveries against Pfizer. Unfortunately, the state court in *Taylor* had elected to consider simultaneously both petitioners' motion for class certification and Pfizer's motion for summary judgment that raised substantive defenses based on Pfizer's version of the facts. This required the parties to undertake extensive and time consuming merits discovery (involving six million documents) before the court would even address petitioners' motion for class action certification and notice to the class. As shown below, the *Taylor* putative class has still not received notice of the pendency of the *Taylor* class action.

On March 28, 1991, while discovery on Pfizer's summary judgment motion was actively being pursued in *Taylor*, a Cincinnati law firm ("Class Counsel") filed a class action complaint in the United States District Court for the Eastern District of Kentucky that alleged a putative class consisting of all persons in the United States with Pfizer's 60-degree heart valves. *Wright v. Pfizer*, CA. No. 91-58 (E.D. Ky. March 18, 1991). Less than one month later, and with the concurrence of Pfizer, Class Counsel forum shopped, abandoned the Kentucky case, *see* 143 F.R.D. at 148, and filed the identical complaint in federal court in Cincinnati as the *Bowling* case, on behalf of the same named plaintiffs (but adding one Ohio resident), seeking certification of the identical class. RA 1.[2] Both of these filings were without the knowledge of petitioners, although Pfizer, the common defendant in *Wright*, *Bowling* and *Taylor* knew that a competing class action was pending in *Taylor*, awaiting class certification.

Shortly after the filing of the complaint in *Bowling*, without any meaningful discovery or investigation having been undertaken on behalf of the class (*See*, *Bowling* 143 F.R.D. at 161), Class Counsel and Pfizer privately agreed to stipulate to class certification and settle the case. On November 19, 1991, Class Counsel and Pfizer's lawyers met in a secret, in-chambers

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2. Citations to "RA" are to the record on appeal filed with the Sixth Circuit (Case No. 92-3973) in connection with petitioners' earlier appeal of the district court's decision approving the *Bowling* settlement.

conference with the district court, described the settlement, discussed Class Counsel's expected $20 million counsel fee and had the record of the meeting sealed to avoid prompting too many objections from class members if the news of the settlement leaked out too early.[3] On January 23, 1992, the district court signed a perfunctory order conditionally certifying a class under Fed. R. Civ. P. 23(b)(3) that is much broader in scope than the class alleged in the complaint and which, by stipulation of counsel, now includes in its sweep all recipients of 60-degree heart valves and recipients of a different product than any named plaintiff has – 70-degree heart valves – and their spouses, wherever they might reside, anywhere on earth. *Compare* RA 1 (class action complaint) *with* RA 43 (notice of class action settlement).

In February of 1992, petitioners received the Notice to the Class ordered by the court, and learned that a federal district court in Ohio had certified a global class under Fed. R. Civ. P. 23(b)(3) that overlapped with the class they were seeking in their class action motions pending in *Taylor*. The Notice to the Class in *Bowling* informed unnamed class members that they could not object to the class certification or the proposed settlement if they elected to opt out of the class and that, if they wanted to object or participate in the Fairness Hearing, they or their attorney must file an appearance. There was no statement in the Notice that class members would have to intervene to have standing to participate in the Fairness Hearing or to appeal any ruling concerning the settlement or the Fairness Hearing proceedings. *Id.* The *Bowling* Notice to the Class also said nothing about the *Taylor* class action that was pending simultaneously for the benefit of thousands of persons included within the sweep of the *Bowling* class definition with a nexus to Pennsylvania. RA 43.

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3. The transcript (RA 33) on motion of petitioners and other objectors was unsealed immediately prior to the start of the Fairness Hearing. It is significant that Class Counsel and counsel for Pfizer deliberately withheld informing the district court about the pendency of the *Taylor* class action, notwithstanding the requirements of Fed.R.Civ.P. 23(b)(3)(B) (RA 33).

The *Bowling* Notice to the Class was a complete surprise to petitioners since Pfizer had notified neither them nor the judge in Pennsylvania that Pfizer (a party-defendant in *Taylor*) had agreed to settle an overlapping class that would effectively terminate the rights of the putative class members in *Taylor* who did not opt out of *Bowling*. As noted above, the Pennsylvania court in *Taylor* had not yet reached the point of ruling on the class certification motion in *Taylor* or of ordering notice to the *Taylor* class. In addition, petitioners did not know the names and addresses of the putative class members in *Taylor* because Pfizer had refused to provide this information in discovery. As a result, the thousands of putative class members in *Taylor* had no way of knowing that they had a potentially attractive alternative to the proposed settlement described in the *Bowling* Notice to the Class.

Petitioners, in their dual role as named plaintiffs in the *Taylor* class action, and unnamed class members in *Bowling*, were faced with the dilemma of whether to opt out of the *Bowling* class or remain in as objectors. As a result of the district court's order in *Bowling*, if petitioners opted out of the *Bowling* class, they couldn't object to class certification, the *Bowling* settlement, or participate in the Fairness Hearing, with the result that thousands of putative class members in *Taylor* (who for the reasons explained above did not know about the benefits *Taylor* offered as an alternative to the *Bowling* settlement) would have their causes of action against Pfizer extinguished by virtue of the judgment and settlement in *Bowling*. Petitioners, therefore, had a fiduciary responsibility to protect the rights of the members of the putative Pennsylvania class whom they sought to represent in *Taylor* that required them to comply with the district court's conditions for standing to object and participate at the Fairness Hearing. This meant petitioners could not opt out.

On May 5, 1992, petitioners filed timely appearances and written objections to the proposed settlement, the only requirements for standing to participate in the Fairness Hearing that had been established by the district court in *Bowling*. RA 72, 143. Thereafter, with no objection from Pfizer or Class Counsel, and without seeking to intervene under Rule 24, petitioners

were allowed by the district court to participate fully in all aspects of the Fairness Hearing proceedings and related matters. *See Bowling*, 143 F.R.D. at 146.[4]

Petitioners saw no reason to intervene in the district court proceedings. The class notice established conditions for standing that contradicted intervention, and two published decisions of the Sixth Circuit held that intervention is not necessary to confer standing on an objecting class member. *See Sertic v. Cuyahoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972); *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942).[5] At no point during the course of the Fairness Hearing did the district court, Pfizer, or Class Counsel suggest that intervention was necessary or appropriate. Also, there were numerous other unnamed class members who were represented by their own counsel and objected at the Fairness Hearing; and none of the other objectors thought intervention was appropriate either. In fact, at every juncture in the proceedings, the district court confirmed by its actions that intervention was not required. (*See*, e.g., RA 256.)

Petitioners did not confine their objections to the benefits of the settlement. In addition, and with greater emphasis,

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4. Thus, petitioners: (a) filed and obtained rulings on numerous substantive and procedural matters, RA 83, 97, 113, 140, 145, 158, 168, 190, 202, 206-208, 211, 216, 229, 235, 230, 250, 221; (b) obtained in response to their written and oral motions an explicit written order granting their right to be heard and to participate in the Fairness Hearing, *see Bowling*, 143 F.R.D. at 147, RA 229, 250; (c) made substantive oral presentations and arguments at each settlement-related hearing and proceeding, RA 97, 113, 140, 158, 202, 207, 208, 251; (d) were permitted to cross-examine and to question experts who had made presentations on behalf of the proponents of the settlement, RA 202; (e) took written discovery of Class Counsel and respondents, RA 83, 229; (f) marked numerous exhibits and introduced into the record affidavits and other evidence, RA 143, 190, 202, 208; (g) were invited to, attended, and participated in status conferences and hearings, RA 158; (h) raised issues and obtained court action on matters that were peculiar to petitioners, and were not raised by other parties, RA 143, 159, 190, 218, 221, 229, 210, 145, 168, 206, 211, 235, 250; and (i) had their Philadelphia-based counsel admitted *pro hac vice* and appeared as well through local counsel, RA 84, 99, 230, 272.

5. As explained *infra* at Point III, two major treatises on class action procedure and two other courts of appeals also identified the Sixth Circuit as not requiring class members to intervene as a condition of appeal.

petitioners pressed the point that the district court was not complying with Rule 23; the district court was not exercising the proper scrutiny and should have allowed an evidentiary hearing because of the facts on the record of forum shopping, collusion, failure of Class Counsel to take discovery and the apparent attempt by the proponents of the settlement to mislead the court and the class; and the defects in the notice to the class. Moreover, petitioners, without success, moved repeatedly in the district court to certify a subclass of Pennsylvania residents. *See Bowling*, 143 F.R.D. at 161; RA 159, 190, 207, 208, 221, 251. The basis for petitioners' request for a subclass was that the Pennsylvania court in *Taylor* had entered an order denying essentially the same motion to dismiss on which Pfizer had obtained favorable rulings in other courts. Yet, according to the proponents of the settlement, it was the impact of these rulings that justified the meager benefits provided in the settlement. Therefore, in petitioners' view, the putative class in *Taylor* had an advantage over class members in *Bowling* who were in jurisdictions bound by earlier adverse rulings. Petitioners asked also that the portion of the *Bowling* class that overlapped with the putative class in *Taylor* be given a new notice to inform them of their options.

On August 19, 1992, the district court issued an opinion and order in which it certified a final settlement class under Rule 23(b)(3) and approved the settlement. The district court's opinion was devoted primarily to a discussion of the issues and arguments raised by petitioners concerning their attack on the adequacy of representation, and asserted violations of Rule 23. *Bowling*, 143 F.R.D. at 151.[6]

Petitioners filed a prompt notice of appeal to the Sixth Circuit on September 17, 1992. RA 258. A few days after filing

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6. The text of the reported opinion in *Bowling* begins at 143 F.R.D. 145 and ends on page 170. Page 145 describes some, but not all, of the written documents, pleadings, objections and motions petitioners had filed. The court described petitioners as "the Green firm," since petitioners' lead attorney was Gary Green, Esq. Thereafter, the court concentrated on matters raised by or pertaining to the Green firm on page 146 and from pages 151 through 167. Hence, *18* pages of the district court's opinion related to the participation of petitioners both before, during, and at the conclusion of the Fairness Hearing.

the notice of appeal, however, petitioners were informed that Pfizer intended to file a motion to dismiss the appeal, and to raise for the first time in the history of the case the ground that petitioners had not formally intervened. Solely as a protective measure, petitioners filed in the district court on September 25, 1992, a motion to intervene in aid of their appeal. RA 265. On October 21, 1992, petitioners filed an amended motion to intervene. Petitioners requested that, if the district court granted their motion to intervene, the date of the court's order relate back to the date on which petitioners entered their appearance in *Bowling*. RA 288. By order dated November 9, 1992, the district court declined to rule on petitioners' intervention motions on the ground that the filing of the notice of appeal had created "uncertainty" about the court's continuing jurisdiction over the case.

On March 2, 1993, while the appeal was pending, petitioners filed a fact based motion under Fed.R.Civ.P. 60(b) showing new evidence that had surfaced concerning fraud and misconduct by the proponents of the settlement in procuring approval of the settlement. Petitioners' Rule 60(b)(3) motion raised issues relating to the respondents' deliberate and fraudulent withholding of crucial information from the district court during the Fairness Hearings. The motion referenced newly uncovered facts about, *inter alia,* Class Counsel's misrepresentations to the district court concerning the extent of the documents and other material he had access to and reviewed prior to agreeing to the terms of the settlement; Pfizer's providing the district court with misleading and false information concerning the status of Pfizer's medical research activities; respondents' purposeful hiding from the district court and the class facts concerning Pfizer's agreements and negotiations (contemporaneous with the Fairness Hearing) to settle cases of individuals who had opted out of the class for more than $100,000 each; respondents' cover-up of Pfizer's fraud on the Food and Drug Administration covering Pfizer's manufacturing activities; and Pfizer's non-disclosure to the district court of the United States Department of Justice's criminal and civil investigation into Pfizer's acts of fraud in connection with its heart valve activities. Each of these matters, if known at the Fairness Hearing, would have tended to prove a

collusive settlement, and that the proponents had intentionally misled the court about crucial facts on which the court's settlement approval rested.

On March 2, 1993, Pfizer moved to dismiss petitioners' appeal of the order certifying the class and approving the settlement, on the ground that petitioners lacked standing to appeal because they had not formally intervened in the case. Meanwhile, Petitioners' motions under Rule 24 and Rule 60(b)(3) remained *in limbo* in the district court.

In a two-paragraph order dated December 21, 1993, marked "Not Recommended for Full Text Publication", the Sixth Circuit dismissed petitioners' appeal, "[b]ecause the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue the appeal." 7a. The unpublished order did not mention the Sixth Circuit's prior decisions in *Cohen* and *Sertic*.

In another order issued on December 21, 1993, the Sixth Circuit affirmed the district court's decision declining to rule on petitioners' motion to intervene. *See* 14 F.3d 600 (Table) (1994), reprinted at 10a.

Petitioners then petitioned for rehearing *en banc* of the Sixth Circuit's order dismissing their appeal of the settlement's approval arguing, *inter alia*, that the panel's unpublished order contradicted two published Sixth Circuit decisions — *Cohen* and *Sertic* — and that by dismissing their appeal in an unpublished order, the panel had taken the extraordinary step of creating a non-precedent-setting ruling that contradicted published Sixth Circuit decisions, thereby depriving petitioners of their right to due process under the U.S. Constitution. In a two-paragraph order dated March 4, 1994, the Sixth Circuit denied the petition for rehearing. 8a.

Petitioners then filed a petition for a Writ of Certiorari which was denied on October 3, 1994. 9a.

As noted, during the time of the initial appeal, there were two undecided motions pending in the district court: a motion under Rule 60(b)(3) and a motion under Rule 24 seeking intervention. On April 5, 1994, the district court finally ruled on petitioners' pending motion to intervene (which had been pending since September 25, 1992). The district court denied

petitioners' motion on the sole ground that "the substantial delay between the approval of the settlement and return of the case to this Court, and the fact that intervention at this point would be prejudicial to the class . . . .". 6a. On April 13, 1994, petitioners filed a motion pursuant to Rule 59(e) and Rule 24(a) and (b) of the Federal Rules of Civil Procedure seeking reconsideration of the denial of their motion to intervene.

While petitioners' Rule 59(e) motion (seeking reconsideration of the denial of intervention) was still pending, the district court, on April 12, 1994 entered an order denying petitioners' Rule 60(b)(3) motion that had been filed in November 1993. 5a. The district court characterized petitioners' Rule 60(b)(3) motion as "a motion to reconsider this court's approval of the settlement agreement in this class action". 5a. Without addressing any of the proofs of fraud and misconduct raised in the 60(b)(3) motion, the court denied the motion based solely on "the interest of justice". 5a. With the time for appealing the denial of the Rule 60(b)(3) motion about to expire, on May 3, 1994, petitioners were forced to file a notice of appeal from that decision, even though petitioners' Rule 59(e) motion (seeking reconsideration of the denial of intervention) was still undecided by the district court.[7]

On May 17, 1994, the Sixth Circuit, *sua sponte,* issued an order directing petitioners to show cause why their appeal of the denial of their 60(b)(3) motion should not be dismissed for lack of standing due to their failure to intervene. 3a. Petitioners responded and requested that the Sixth Circuit stay and/or hold in abeyance the appeal, and that the case be remanded to the

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7. Petitioners would have preferred to have had a ruling on their Rule 59(e) motion (that asked the district court to reconsider its denial of intervention) before they filed the appeal of the district court's denial of their Rule 60(b) motion. However, because petitioners did not know that the district court had denied their Rule 60(b) motion (the Rule 59(e) motion and the district court's April 5, 1994 order denying the Rule 60(b)(3) motion crossed in the mail), and petitioners had no choice about the timing of the filing of the appeal of the denial of their Rule 60(b)(3) motion, they could not yet appeal the denial of intervention. Accordingly, the question of whether petitioners would be allowed to intervene was still an open question at the time petitioners filed their appeal of the denial of their 60(b)(3) motion.

district court for further proceedings on the petitioners' Rule 59(e) motion (seeking reconsideration of the denial of intervention), which was still unresolved in the district court.

On August 8, 1994, the Sixth Circuit dismissed the petitioners' appeal of the denial of their Rule 60(b) motion on the ground that "[h]aving been denied intervenor status in this case, it follows that the appellants also lack standing to appeal the denial of the Rule 60(b) motion." 1a. The Sixth Circuit also denied as moot petitioners' request for a remand back to the district court. 1a.

As of this date, petitioners' Rule 59(e) motion is still pending in the district court. On October 11, 1994, petitioners filed a motion in the district court requesting that the court rule on that outstanding motion.

In their appeal to the Sixth Circuit of the district court's denial of petitioners' Rule 60(b) motion, they asserted the district court failed to follow the proper procedures in evaluating petitioners' motion, thus turning its head away from fraud that injured the class and the integrity of Rule 23. *See,* petitioners' "Statement of Issues on Appeal" filed in the Sixth Circuit. 12a. The result of the Sixth Circuit's ruling is that apparent gross acts of fraud and collusion by the proponents of the settlement have first escaped any scrutiny by the district court and then escaped any review by an appellate court. The impact on the absent class members is palpable.[8] The Sixth Circuit's ruling also undermines the predictability of the law and is calculated to deprive millions of unnamed class members in future cases of the protections of Rule 23.

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8. For example, as in *Taylor*, a California court has upheld a cause of action for fraud against Pfizer. *Khan v. Shiley, Inc.*, 217 Cal. App. 3d 848, 266 Cal. Rptr. 106 (4th Dist. 1990), *review denied*, 1990 Cal. LEXIS 1952 (May 3, 1990). As a result, nearly 1,000 class members opted out of *Bowling* to pursue their individual heart valve claims against Pfizer in California. According to news reports, at least 340 of these individuals ultimately obtained settlements in excess of $100,000 per pre-fracture implantee. *See* "$31-Million Settlement May Be in Works on Shiley Heart Valve", *Los Angeles Times*, p. D1 (October 17, 1992). The putative *Taylor* class could very well have achieved comparable recoveries in Pennsylvania if the district court had not denied petitioners' motion to certify a Pennsylvania sub-class and approved the *Bowling* settlement.

REASONS FOR GRANTING THE WRIT

I. There Is A Deep And Confusing Split In The Circuits As To Whether Unnamed Class Members Of A Settlement Class Certified Under Fed.R.Civ.P. 23(b)(3) Must Formally Move And Be Permitted to Intervene In Order To Appeal Final Orders Affecting Their Interests.

The first reason the writ should be granted is to resolve the deep split among the circuits on the precise question presented in this case: whether an unnamed class member who was permitted to participate in the district court Fairness Hearing proceedings without intervening and who contends that the district court and the proponents of the settlement violated Rule 23 in connection with a class action certification and settlement must formally move and be permitted to intervene in the case to have standing to appeal final orders growing out of the Fairness Hearing. The circuit courts themselves acknowledge the split, the confusion and how each circuit is drawing different conclusions from the rulings of the other circuits.

For example, the Tenth Circuit in *Gottlieb v. Wiles,* 11 F.3d 1004, 1010, n.5 (10th Cir. 1993) disagreed with the Third Circuit's analysis of the views of the Fifth, Eighth and Eleventh Circuits as expressed in *Carlough, et al. v. Amchem Prod. Inc., et al.* 5 F.3d 707 (3d Cir. 1993).

The Sixth Circuit in *Shults, et al. v. Champion International Corporation,* 1994 WL 509053 (6th Cir. 1994) explicitly recognized the deep split on this issue and lack of agreement in the circuit courts. ("In *Guthrie,* for example, the case that appears to be the progenitor of the modern trend in the federal courts in this *unsettled* area of the law, the Eleventh Circuit held in 1987 that a non-named class member does not have standing to appeal the final judgment in a class action.") (emphasis added).

This unsettled nature of the issue is apparent in the Seventh Circuit's opinion in *In the Matter of VMS Ltd. Partnership Sec. Litig.,* 976 F.2d 362 (7th Cir. 1992), where the court held that an unnamed class member has standing to appeal from the approval of a settlement of a class action in response to a Rule 23(e) notice, but did not have standing to appeal a post-settlement order

implementing the settlement agreement. Moreover, in *VMS*, the court ignored the distinctions between Rule 23(b)(1), 23(b)(2) and 23(b)(3) cases notwithstanding the significance the Seventh Circuit gave them in its prior decision in *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970). Adding to the confusion is the Tenth Circuit's observation that the Seventh Circuit would eventually adopt the holding in *Guthrie*, despite the Seventh Circuit's statement in *VMS* that, "[W]e offer no opinion on the merit of *Guthrie's* principle as applied to an unnamed class member who appeals the approval of a consent decree." *Gottlieb*, 11 F.3d at 1012. *See also, Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 678 (8th Cir. 1992) (circuits are divided on issue and some have inconsistent holdings whether an unnamed class member has standing to appeal an order approving settlement). *See generally* Timothy A. Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933, 934-40 (1993) (discussing circuit split). Only review by this Court will ensure uniformity in the procedure to be followed by an absent class member who wishes to preserve an opportunity for appellate review.

Three federal courts of appeals – the Third, Seventh, and Ninth Circuits – have consistently allowed objecting, nonintervening class members to appeal approvals of settlement agreements.[9] These circuits' decisions are in accordance with

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9. *Third Circuit: Carlough, et al. v. Amchem*, 5 F.3d 707, 714 (1993) (denial of objecting class members' intervention motion not immediately appealable under collateral order doctrine since intervention would not be required to appeal merits of settlement); *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30, 33 (1971) (nonintervening, objecting class members have standing to appeal class action settlement). *Cf. Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (1993) (nonintervening, objecting shareholders have standing to appeal approval of settlement in a derivative suit).

Seventh Circuit: Armstrong v. Board of School Directors, 616 F.2d 305, 327-28 (1980) (nonintervening, objecting class members have right to appeal from a class action judgment); *Patterson v. Stovall*, 528 F.2d 108, 109 n.1 (1976) (nonintervening, objecting class members have standing to appeal settlement agreement); *Research Corp. v. Asgrow Seed Company*, 425 F.2d 1059, 1060 (1970) (nonintervening class member who appears in response to Rule 23(e) notice and objects to a settlement has right to appeal from an adverse judgment). *Cf. In the Matter of VMS Ltd. Partnership Sec. Litig.*, 976

the explanation of current law set forth in all three of the leading treatises on class action procedure in the federal courts. *See* James W.M. Moore, 3B *Moore's Federal Practice*, ¶ 23.80[5], at 23-496 (Matthew Bender, 1993) ("[a] member of a class who appears in response to the court's notice given pursuant to [Rule 23(e)], and objects to the dismissal or compromise has a right to appeal from an adverse final judgment although he did not become a formal party of record.") (footnote omitted); Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions*, § 1.04, at 1-13 (McGraw Hill, 3d ed. 1992) ("[c]ertainly class members are parties for purposes of . . . objecting to and appealing from an order approving a class settlement . . ."); Charles A. Wright, *et al.*, 7B *Federal Practice and Procedure*, § 1797, at 360-61 (West, 2d ed. 1986) ("[o]f course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise on appeal from the entry of the final judgment.") (footnote omitted).

The decisions holding that unnamed class members have standing to appeal a settlement's approval recognize that an appeal is often the only mechanism by which an absent class member can protect his or her rights. *See generally Ace Heating*, 453 F.2d at 33. Permitting class members to opt out of class actions does not provide adequate protection, since, in reality, "many small claimants frequently have no litigable claims unless aggregated." *Id.* Absent a right to appeal, "such

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NOTES *(Continued)*

F.2d 362, 368 (1992) (unnamed class member must intervene in order to appeal post-settlement order implementing settlement agreement; distinguishing *Research Corp.* on factual grounds, but acknowledging its continued viability with respect to appeals of decisions approving settlements).

Ninth Circuit: In re Cement Antitrust Litig., 688 F.2d 1297, 1309 (1982) ("a class member may appeal from an order approving a settlement to which the member objects"), *aff'd*, 459 U.S. 1191 (1983); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (1981) (dissatisfied class member could have challenged settlement by direct appeal); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (1977) (unnamed class members appealing from the district court's approval of a class action settlement had "legal rights affected by the settlement and [thus] has standing to sue").

claimants would be faced with equally unpalatable alternatives — accept either nothing at all or a possibly unfair settlement." *Id.*

The Tenth Circuit has embraced a hybrid view. In *Gottlieb v. Wiles* 11 F.3d 1004, 1012 (10th Cir. 1993), the court held that unnamed class members in a Rule 23(b)(3) action have standing, even absent an order allowing intervention, to raise claims of due process violations in the notice to the class. *Id.*, 11 F.3d at 1012, as well as claims of violations of the Rule 23 procedures intending to protect the rights of unnamed class members. *Id.*, 11 F.3d at 1009, 1010. On the other hand, under the Tenth Circuit's rule, if the unnamed class member objects only to the adequacy of the settlement, he must be granted intervenor status to gain standing to appeal. *Id.*, 11 F.3d at 1012.[10]

In contrary authority, the Fifth, Eighth, and Eleventh Circuits have held in Rule 23(b)(2) class actions that nonintervening class members lack standing to appeal an order approving a settlement.[11] But other circuits have extended these holdings to Rule 23(b)(3) cases as the Sixth Circuit did here. *See, Gottlieb,* 11 F.2d at 1012.

The confusion stems in part from the fact that the progenitor cases for the "no standing rule", *Guthrie,* an Eleventh Circuit case, and *Walker,* a Fifth Circuit case, both grew out of a long Fifth Circuit tradition in Rule 23(b)(2) class actions of

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10. As noted, petitioners here did not raise a claim based solely on the adequacy of the settlement when they challenged the approval of the settlement in their Rule 60(b) motion.

11. *Fifth Circuit: Loran v. Furr's/Bishop's Inc.,* 988 F.2d 554, 554 (1993) (appellate court lacks jurisdiction to consider appeal by class member who has not attempted to intervene as a named party); *Walker v. City of Mesquite,* 858 F.2d 1071, 1074 (1988) (unnamed members of certified plaintiff class lacked standing to challenge consent decree approving a settlement between the named parties).

Eighth Circuit: Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 679 (1992) ("unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so"), *cert. denied,* 113 S. Ct. 1251 (1993).

Eleventh Circuit: Guthrie v. Evans, 815 F.2d 626, 627 (1987) ("a class member who is not a named plaintiff [ ] does not have standing to appeal the final judgment in [a] class action.")

requiring – but always allowing – intervention by objecting, unnamed class members as a condition to establish standing in injunctive relief cases. *See, Woolen v. Surtran Taxi Cabs, Inc.*, 684 F.2d 324, 332-333 (5th Cir.1982) for a discussion of the Fifth Circuit's historical rule in 23(b)(2) cases. In *Woolen,* the court noted that a class member in a Rule 23(b)(3) class would be treated differently since if he feels he is not getting adequate representation, he could elect to either "opt out under 23(c)(2) or to enter an appearance through counsel of his choosing". 684 F.2d at 332. The obvious implication is that in a Rule 23(b)(3) case brought in the Fifth or Eleventh Circuit, if an unnamed class member's counsel entered his appearance, the class member would have standing to appeal. Thus in *In re Dennis Greenman Securities Litigation,* 829 F.2d 1539 (11th Cir. 1987), the Eleventh Circuit allowed an appeal by a nonintervening, unnamed class member in a Rule 23(b)(3) class action. *In re Dennis Greenman* was decided by the Eleventh Circuit in October of 1987 while the Eleventh Circuit issued its opinion in *Guthrie,* a Rule 23(b)(2) case in April of 1987; and Judge Hill was a panel member in both cases. Therefore, it appears that the Sixth, Eighth and Tenth Circuits that purport to rely on *Guthrie* and *Walker* may have misapplied or expanded the essence of their holdings.

As other courts and commentators have pointed out, a rule requiring formal intervention by every class member who objects to a settlement will surely render class actions *more* unwieldy than simply permitting objecting class members to appeal. *See* Duffy, *The Appealability of Class Action Settlements by Unnamed Parties,* 60 U. Chi. L. Rev. at 954. *See also infra* at Point II.B. (discussing fallacy underlying claim that rule requiring intervention increases judicial efficiency).

Prior to the decisions in this case denying standing to petitioners, the Sixth Circuit's view accorded with that of the Third, Seventh, and Ninth Circuits. Subsequently, the Sixth Circuit, in *Shults v. Champion International Corporation,* 1994

WL 509053 (6th Cir. 1994) (September 20, 1994), finally published an opinion which purports to both embrace the no-standing rule, but not overrule its earlier, and directly contrary opinions in *Sertic,* 459 F.2d at 579 and *Cohen,* 127 F.2d at 721.[12]

But, the Sixth Circuit in *Shults* further confused its position by proceeding to address and decide, *on the merits,* the claim that the class representatives afforded the unnamed class member-appellants in *Shults* inadequate representation. *Id.* at 5. Hence, the Sixth Circuit apparently would allow an unnamed class member who had not been granted formal intervenor status standing to appeal if: (a) he could prove factually a violation of Fed.R.Civ.P. 23(a)(4) (adequacy of representation); (b) if the words of the notice to the class invited the unnamed class members to "show cause why a proposed settlement should not be approved" (*Id.* at 3; *Cohen, supra.*); or (c) if a motion for intervention was denied and reversed on appeal (*Id.* at 5; *Sertic*). "But a mere voluntary appearance to state or file objections is an insufficient basis for standing to appeal." *Id.* at 5.

It is obvious that the courts of appeals are deeply split on the issue presented in this case, and the whole area of class action jurisprudence has lost its moorings. Part of the problem can be traced to this Court's decision in *Marino v. Ortiz,* 484 U.S. 301 (1988) (per curiam), a Title VII lawsuit in which a consent decree approving a settlement was challenged by individuals who were not parties to the litigation. (The certified class consisted of *Hispanic* police officers who claimed that a civil service examination they were required to take caused a disparate impact in promotion decisions. A group of *white* police officers who were neither members of the class nor of any of the groups of other white officers who *had* moved to intervene

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12. The *Shults* panel noted that one panel of its court could not overrule the decision of a prior panel, and therefore, *Sertic* and *Cohen* could not be restricted by the opinion in *Shults.* However, the court then went on to limit these cases strictly to their facts, and held that *Cohen* allowed an unnamed class member standing to appeal only if he was "hauled into court" *Id.* at 3, and *Sertic* provided standing only if the class member were successful in appealing a denial of intervention. *Id.*

appealed the settlement eventually reached between the class and the city.) This Court affirmed the dismissal of their appeal, stating that, "because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving the lawsuit's settlement." 484 U.S. at 304.

In the view of some circuit courts, *Marino* "provide[s] substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Croyden*, 969 F.2d at 679; *see also Walker*, 858 F.2d at 1074. Other courts and commentators have disagreed, noting that, because the objectors in *Marino* were not even members of the class, that decision did not "settle [ ] whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of the compromise." *Bell Atlantic*, 2 F.3d at 1307; *see also* Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 946 (despite *Marino*, "lower courts . . . have decided that a nonparty may sometimes appeal without prior intervention") (footnote omitted) (collecting cases); N.E. Paolini, *Recent Development: Walker v. City of Mesquite: The Nonappealability of Class Action Consent Decrees by Non-named Class Members*, 63 Tul. L. Rev. 1732 (June 1989) ("[t]he *Walker* court . . . dramatically broadened the *Marino* holding to include non-named class members.")

Petitioners submit that *Marino* has no application here, since that case did not in any way address the issue of standing of a *bona fide* class member who participated vigorously throughout the district court proceedings to appeal a ruling directly affecting his or her rights. In any event, *Marino* has not eliminated or resolved the preexisting disagreement among the circuits as to the rights of unnamed class members to appeal judgments that directly affect their interests. *See, e.g., Carlough*, 5 F.3d at 714 (post-*Marino* decision holding that objecting class members may appeal decision approving settlement without intervening); *cf. Bell Atlantic Corp.*, 2 F.3d at 1310 (post-*Marino* decision discussing deep split in circuits and

holding that nonintervening, objecting shareholders have standing to appeal approval of settlement of derivative action). The writ should be granted so as to resolve that confusion and protect members of future classes from being caught in the same trap of conflicting precedent that snared petitioners in this case.

II. This Case Presents Two Important Questions Of Federal Law That Have Not Been, But Should Be, Decided By This Court.

Review is also warranted because this case presents two important questions of federal law that should be decided by this Court. First, must an unnamed member in a 23(b)(3) class intervene to have standing to appeal final orders from a Fairness Hearing that resolve his rights? Second, does such a class member have standing to appeal under Fed.R.Civ.P. 60(b)(3) even if he is not deemed to be a "party"?

The questions presented are important because requiring intervention does not simply impose an additional paperwork burden on objecting class members. To the contrary, this requirement has the practical effect of drastically limiting the availability of appellate review of class certification decisions, the integrity of the settlement approval process, and of the merits of class action settlements. At the same time, the intervention requirement greatly increases the burdens of class action litigation on class members and the courts – precisely the opposite result of what the intervention rule ostensibly was intended to achieve.

A. The Intervention Requirement Unduly Limits Objecting Class Members' Rights To Appeal.

The most egregious effect of the intervention requirement is that it operates greatly to restrict the availability of appellate review of both class certification decisions and the merits of class

action settlements.[13] Without such review, there is no meaningful procedural check on the actions of district courts. Yet this check is especially critical in the class action context, where there is an inherent danger that unnamed class members' rights may be compromised in favor of the interests of the class representatives (or their attorneys). As the district court itself noted in *Bowling*, "[t]he possibility of collusion exists in class actions. A defendant has an interest in minimizing its liability; Class Counsel has an interest in his attorney's fee." 143 F.R.D. at 152 (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action,* 54 U. Chi. L. Rev. 877, 883-89 (Summer 1987)). In order to protect against such collusion, the Federal Rules of Civil Procedure require district courts to evaluate the fairness of proposed class action settlements before they can be implemented. *See* Fed. R. Civ. P. 23(e). However, absent appellate review, "even the most conscientious and diligent judge may be tempted to overlook what are often eleventh hour objections to settlements . . .." Duffy, *The Appealability of Class Action Settlements by Unnamed Parties,* 60 U. Chi. L. Rev. at 947. Thus, any rule limiting appellate review of class action settlements increases the potential for unfair, collusive settlements that are not in the best interests of the class. This is precisely the result the drafters of Rule 23 sought to avoid by prohibiting the dismissal or compromise of class actions without judicial approval.

Appellate review is equally important with respect to class certification decisions. This Court has recognized that "actual, not presumed, conformance with [the certification requirements of] Fed. R. Civ. P. 23(a) remains . . . indispensable." *General Telephone Company of Southwest v. Falcon,* 457 U.S. 147, 160 (1982). One essential way to ensure that the "actual conformance" standard has been met is to permit appellate review of

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13. Although the Supreme Court has never held that due process requires appellate review of lower court decisions, *see, e.g., Lindsey v. Normet,* 405 U.S. 56, 77 (1972), Congress has conferred appellate jurisdiction on the courts of appeals from "all final decisions of the district courts." 28 U.S.C. § 1291.

certification decisions. *Id.* Any restrictions on the availability of such review invites district courts to deviate from the certification requirements on which absent class members' rights depend — a result directly contrary to this Court's decision in *Falcon.*[14]

Many class members will simply fail to intervene, either because they are not represented by counsel or are unaware that intervention is required in order to preserve their rights to appeal.[15] More importantly, even objectors who *do* move to intervene may be deprived of their opportunity to appeal a class certification or a settlement's approval by adverse decisions on their intervention motions. Rule 24 of the Federal Rules of Civil Procedure provides for two types of intervention: intervention as of right and permissive intervention. Intervention as of right is available only if the proposed intervenors demonstrate that they are not being adequately represented by existing parties. *See Bradley v. Milliken,* 828 F.2d 1186, 1191 (6th Cir. 1987). Satisfying this requirement is extremely difficult under *any* circumstances;[16] it is even harder where, as here, a proposed

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14. In this case, for example, a major portion of petitioners' first appeal argued that the district court's certification of the *Bowling* class fell far short of "actual conformance" with Rule 23. Yet the Sixth Circuit's dismissal of petitioners' appeal effectively rendered the certification decision absolutely immune from scrutiny. Similarly, the dismissal of petitioners' appeal of the denial of their Rule 60(b)(3) motion (the subject of this petition) allowed proven allegations of fraud and misconduct to remain unscrutinized or reviewed, despite their obvious impact on Rule 23(a)(4)'s requirements.

15. The danger that class members will unwittingly forfeit their appellate rights is made more likely where, as in this case, the class notice places stringent conditions on the right to participate in the district court proceedings that do *not* include the need to file a motion to intervene. RA 43.

16. In general, "the applicant for intervention bears the burden of demonstrating inadequate representation." *Meyer Goldberg, Inc. v. Goldberg,* 717 F.2d 290, 293 (6th Cir. 1983). This requires "overcom[ing] the presumption of adequacy of representation that arises when a proposed intervenor and a party to the suit . . . have the same ultimate objective." *Wade v. Goldschmidt,* 673 F.2d 182, 186 n.7 (7th Cir. 1982) (per curiam). An applicant for intervention fails to meet its burden of demonstrating inadequate representation "when no collusion is shown between the representative and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed

settlement is reached prior to class certification, and a conditional settlement class is certified without the district court having considered the adequacy of representation. Intervention motions can be expected to fail at this stage because there is a presumption (especially after a court has certified a conditional settlement class, as was done here) that all class members' interests are represented adequately, "against which the petitioner must demonstrate adversity of interest, collusion or non-feasance." *International Tank Terminals, Ltd. v. M/V Acadia Forest,* 579 F.2d 964, 967 (5th Cir. 1978) (quoting *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)). Making such a demonstration on what little information that can be gleaned from the Rule 23(e) Notice to the Class is difficult, if not impossible, especially if the forum court is hundreds or thousands of miles away from the class members. Thus, as a practical matter, intervention as of right could easily be denied in cases where the class action is settled at an early stage of the litigation.

In addition, in its opposition to petitioners' motion to intervene in this case, Pfizer argued that intervention as of right is actually *foreclosed* when the class action has been certified under Rule 23(b)(3), which gives absent class members the right to opt out. *See Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 332 (5th Cir. 1982); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976). Thus, in Pfizer's view, petitioners were limited to seeking permissive intervention under Rule 24(b). If true, this would pose an even more formidable barrier to appeal, since "[i]ntervention under Rule 24(b) is addressed to the sound discretion of the trial court." *Afro American Patrolmens League v. Duck,* 503 F.2d 294, 298 (6th Cir. 1974) (citation omitted).

Because of these hurdles, decisions denying motions to intervene in the class action context are legion. *See generally* Wright, 7B *Federal Practice and Procedure,* § 1799 at 443-46

NOTES *(Continued)*

in its fulfillment of his duty." *Id.* A mere disagreement over litigation strategy does not, in and of itself, establish inadequacy of representation. *Bradley,* 828 F.2d at 1192 (citation omitted).

nn. 16-18. Thus, any rule requiring intervention as a prerequisite to appeal could operate greatly to restrict appellate review of class certification decisions and class action settlements. The fact that several of the courts of appeals have adopted a rule (in one form or another) that circumscribes the availability of such review illustrates the importance of this case and is an independent reason why review by this Court is warranted and essential.

B. The Intervention Requirement Greatly Increases The Burdens On Litigants And The Courts.

Not only does the intervention requirement restrict appellate review of the merits of class action settlements, but it also greatly increases the burdens on litigants and the courts by enmeshing them in intervention-related proceedings. Ironically, several courts have justified the intervention requirement on the theory that permitting nonintervening objectors to appeal class action settlements will render the litigation "unwieldy." *Guthrie,* 815 F.2d at 628. *Accord Croyden,* 976 F.2d at 678; *Walker,* 858 F.2d at 1074. In fact, however, the rule espoused by these courts will result in greatly protracted and burdensome class action litigation.

In jurisdictions where intervention is required in order to appeal, every class member who is represented by counsel would presumably seek to intervene to leave open the possibility of an appeal. Due to the timeliness requirement of Rule 24, the time for filing intervention motions would likely begin to run when the would-be intervenor first received notice of the proposed class settlement and the Fairness Hearing date. This would force objectors to file their motions to intervene well before the Fairness Hearing commenced, even if the motions to intervene were filed solely out of an abundance of caution. Indeed, it would likely be necessary for the district court to rule on the intervention motions prior to the Fairness Hearing, so that the court and other parties would know how to treat the would-be intervenors.

Each separate motion to intervene would be entitled to full judicial consideration. Moreover, as the courts observed in *Guthrie,* 815 F.2d at 628, and in *Walker,* 858 F.2d at 1074, an

order denying a motion to intervene as of right is a final, appealable order that must be appealed from *immediately,* or the right to appeal is lost. The result would be that if the district court denied all or some of the motions to intervene (a highly possible outcome given the difficulty of establishing inadequacy of representation at this stage of the proceeding, *see* n.17, *supra*), there could be immediate appeals of the denials of intervention, and, if a stay is granted, a postponement of the Fairness Hearing while the appeals were being resolved.

The rule requiring intervention thus results in segmented appeals. While the appeals of rulings on the motions to intervene are pending, the class may have to wait for the results of the appeals before a Fairness Hearing can be held. The benefits of the proposed settlement are potentially delayed, and possibly jeopardized, if the settling defendant experiences a reversal of fortune when the intervention appeals are being decided. In cases where the settlement provides for Class Counsel's fees to be paid out of the settlement funds obtained for the class, the class members will ultimately pay the cost of intervention-generated litigation and appeals.[17]

For these reasons, requiring intervention as a condition of appeal not only burdens and elongates Fairness Hearings, but diverts scarce judicial resources from the already complex

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17. An additional complicating factor is that the notice sent to class members typically offers little more than a thumbnail sketch of the litigation and a cursory outline of the main settlement terms. As a result, the notice often does not provide an adequate basis for class members to evaluate the adequacy of representation. It is not until the Fairness Hearing that problems in the adequacy of representation are likely to become evident to class members. This sets the stage for motions to intervene to be filed by the most skeptical class members immediately upon receiving class notice, with the probability that, if those motions are denied, and the denials are affirmed on appeal, a second wave of motions to intervene will be filed after the Fairness Hearing finally commences. The second wave of motions could bring the Fairness Hearing to another halt if they too are denied, and the denials are appealed. This startling prospect is "precisely the multiplicity of activity which Rule 23 was designed to avoid . . .." *American Pipe and Construction Co. v. Utah,* 414 U.S. 538, 550-51 (1974).

process of evaluating class actions settlements. As one commentator has aptly summarized, the intervention requirement "produces more work for the district court (a formal motion in addition to the settlement hearing), no savings of time for the appellate court (in both cases it has conducted an appeal) and results in no review of the much more basic issue (the fairness and reasonableness of the settlement) by either court." Duffy, *The Appealability of Class Action Settlements by Unnamed Parties,* 60 Univ. Chi. L. Rev. at 954. Preventing this waste is another important reason why review should be granted.

C. A Class Member Bound By A Rule 23(b)(3) Settlement Should Be Permitted To Appeal The Denial Of A Motion Filed Under Rule 60(b)(3) Alleging Fraud And Misconduct In The Procurement Of The Class Settlement.

The Sixth Circuit's order dated August 8, 1994 held that,

> "Having been denied intervenor status in this case, it follows that the appellants also lack standing to appeal the denial of the Rule 60(b) motion . . . . Although the appellants also argue that a nonparty may challenge the validity of the court's judgment where there is alleged to be a fraud upon the court, we do not believe the *special nature* of the Rule 60(b) motion warrants a different conclusion as to standing in this case where the motion seeks to vacate the very settlement as to which this court earlier concluded the appellants lacked standing to challenge." (emphasis added). 2a.

The Sixth Circuit does not explain what it means by "special nature", but it seems obvious that it has determined that class members, unlike utter strangers to the litigation, have no right to appeal *any* order of the district court absent a grant of intervention. The general rule is that even a non-party has standing to raise a challenge asserting that an adversary committed a fraud on the court if the non-party's interests are affected by the final judgment. *Kem Mfg. Corp. v. Wilder,* 817 F.2d 1517, 1521 (11th Cir. 1987). *See, also, Dunlop v. Pan American World Airways, Inc.* 672 F.2d 1044, 1052 (2nd Cir.

1982) [Person has standing to raise Rule 60(b)(3) charges if he is tantamount to being a party or so intimately bound up with the party that his rights are directly affected by the judgment]. The Sixth Circuit's own case, *Southerland v. Irons,* 628 F.2d 978, 980 (6th Cir. 1980) holds that under Rule 60(b), "[a] claim of fraud on the court may be raised by a non-party".

There is no justification for creating a restriction that is special to a member of a Rule 23(b)(3) class that requires him to intervene before he can raise the issue of fraud on the court.

III. The Decision Dismissing Petitioners' Appeal Violated Their Right To Due Process And Is Such An Extreme Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The third reason the writ should be granted is because, in dismissing petitioners' appeal when neither the class notice nor published Sixth Circuit decisions notified petitioners that intervention was required, the Sixth Circuit violated petitioners' right to due process, as did the Sixth Circuits' statement in its August 8, 1994 order, "We are not persuaded to the contrary by appellants' argument that a motion to reconsider the denial of their motion to intervene is pending.". The due process violations and the arbitrary nature of the Sixth Circuit's behavior are highlighted by the Sixth Circuit's denial of petitioners' request for a remand to the district court to allow it to rule upon the pending Rule 59(e) motion before the Sixth Circuit addressed petitioners' Rule 60(b)(3) related appeal. If the Sixth Circuit had remanded, regardless of the district court's ruling on the Rule 59(e) motion (seeking reconsideration of the denial of intervention), petitioners would have achieved automatic standing to appeal the denial of their Rule 60(b)(3) motion. *See, Shults, supra.* Hence, one would have grounds to argue that the Sixth Circuit manipulated the posture of the case to achieve a predetermined and desired result.

The Sixth Circuit's rulings have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Notice to the Class ordered by the district court did not even hint that

intervention was required to establish appellate standing. Since Class Counsel drafted the notice, under Rule 23(a)(4), his representation of the class should be deemed inadequate per se for not alerting petitioners of the intervention requirement in the notice, and during the Fairness Hearing.

Given that due process requires that notice to a class member in a Rule 23(b)(3) class action must fully describe the action and the absent plaintiff's rights in it, *see Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985), and that the Sixth Circuit's own published decisions unequivocally and unanimously held that intervention was *not* required to confer standing on class members to appeal a district court decision approving a settlement, *see Sertic*, 459 F.2d at 579; *Cohen*, 127 at F.2d 724, petitioners had no reason to suspect that intervention would be a condition of appeal. Furthermore, the Sixth Circuit elevated form over substance since the district court had not only granted petitioners' formal motion to be heard at the Fairness Hearing, *see Bowling*, 143 F.R.D. at 147, but it treated petitioners the same as parties or as *de facto* intervenors throughout the proceedings. Either the district court was playing games with petitioners (which we doubt), or it, too, understood the law of the Sixth Circuit as not requiring intervention as a condition of appeal. To the extent the district court was operating under this theory, it was not alone: at least two leading commentators on class action proceedings[18] and two other circuit courts[19] had identified the Sixth Circuit as *not* requiring objecting class members formally to intervene in order to have standing to appeal.

Despite the foregoing, the Sixth Circuit dismissed petitioners' appeal because they did not intervene, and gave no meaning to the fact that petitioners had a *live* intervention motion pending through their Rule 59(e) motion. At the very least, if the Sixth Circuit required intervention, it should have remanded

---

18. *See* Wright, 7B *Fed. Practice and Procedure*, § 1797 at 360-61; *Moore, 3B Moore's Federal Practice* ¶23.80[5] at 496; Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 938.

19. *E.g., Bell Atlantic Corp.*, 2 F.3d at 1308 (3d Cir. 1993); *Research Corp. v. Asgrow Seed Company*, 425 F.2d at 1060 (7th Cir. 1970).

the case to the district court for it to rule on the outstanding intervention motion.

Given that Congress has conferred a statutory right to appeal from adverse decisions of district courts, 28 U.S.C. § 1291, the Sixth Circuit's arbitrary denial of that right deprived petitioners of due process of law and should not be permitted to stand. *See Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 18 (1987) (once state has created right to appeal, civil litigant "cannot, consistent with due process, be arbitrarily denied the right to a meaningful opportunity to be heard on appeal") (Brennan, J., concurring); *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) (due process requires that, once the state has created a right of appeal, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (Fifth and Fourteenth Amendment Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants or as plaintiffs attempting to redress grievances).

Accordingly, the petition should be granted to restore the right to due process that the Sixth Circuit denied petitioners.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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Date: November 6, 1994

APPENDIX

No. 94-3519

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al. Plaintiffs-Appellees,	)	FILED AUG. 8, 1994 LEONARD GREEN,
v.	)	Clerk
ELIZABETH W. RIDGEWAY; ROSEMARY GRUNSBY; FRED GRUNSBY, Class Members, on behalf of themselves and as representatives on behalf of the Pennsylvania Class Objectors Appellants,	)	ORDER
PFIZER, INC.; SHILEY, INC. Defendants-Appellees.	)	NOT RECOMMENDED FOR FULL-TEXT PUBLICATION*

* Sixth Circuit Rule 24 limits citations to specific publications. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently displayed if this decision is to be reproduced.*

BEFORE: MARTIN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

The appellants in this case are members of the certified plaintiff class who objected to the settlement of this class action but who were not named as plaintiffs in the action or granted intervenor status. They appeal the district court's order denying a motion under Fed. R. Civ. P. 60(b) to set aside the settlement. Based on the dismissal of a prior appeal for lack of standing, an order issued in this case for the appellants to show cause why this appeal should not be dismissed for lack of standing. The appellants have responded to that order and also move for a remand to the district court to allow it to rule upon a pending motion to reconsider the denial of their motion to intervene. Both the class plaintiffs and the defendants in the action oppose such a remand and support dismissal of the appeal.

As we stated in dismissal of a prior appeal by these appellants, nonparty class members who object to a settlement have no standing to appeal the settlement in the absence of a grant of intervenor status. *Guthrie v. Evans,* 815 F.2d 626 (11th Cir. 1987); *see also Gottlieb v. Wiles,* 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop Inc.,* 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco,* 969 F.2d 675 (8th Cir. 1992), *cert. denied,* 113 S.Ct. 1251 (1993). Having been denied intervenor status in this case, it follows that the appellants also lack standing to appeal the denial of the Rule 60(b) motion. We are not persuaded to the contrary by the appellants' argument that a motion to reconsider the denial of their motion to intervene is pending. The lack of intervenor status at the time of the appeal suggests that the appellants were not "parties" when they brought the notice of appeal. *See* Fed. R. App. P. 3(c); *see also Jenkins v. Missouri,* 967 F.2d 1245 (8th Cir.), *cert. denied,* 113 S.Ct. 811 (1992). Although the appellants also argue that a nonparty may challenge the validity of the court's judgment where there is alleged to be a fraud upon the court, we do not believe the special nature of the Rule 60(b) motion warrants a different conclusion as to standing in this case where the motion seeks to vacate the very settlement as to which this court earlier concluded the appellants lacked standing to challenge.

Therefore, it is **ORDERED** that this appeal is dismissed for lack of standing. The appellants' motion to remand to the district court is denied as moot.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

No. 94-3519

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al. Plaintiffs-Appellees,	)	FILED MAY 17, 1994 LEONARD GREEN,
v.	)	Clerk
ELIZABETH W. RIDGEWAY; ROSEMARY GRUNSBY; FRED GRUNSBY, Class Members, on behalf of themselves and as representatives on behalf of the Pennsylvania Class Objectors Appellants,	)	
v.	)	ORDER
PFIZER, INC.; SHELLEY, INC., Defendants-Appellees.	)	

Appellants, objector-class members in this product liability class action, appeal the order denying their Rule 60(b) motion seeking reconsideration of the approval of a settlement agreement. In a prior appeal, appellants sought review of the order approving the settlement. That appeal was dismissed on the ground that appellants lacked standing. *Bowling v. Pfizer, Inc.*, No. 92-3973 (6th Cir. Dec. 21, 1993). Following that dismissal, the district court denied appellants' motion to invervene on April 4, 1994. On April 12, 1994, the district court denied the Rule 60(b) motion.

Appellants' notice of appeal was filed on May 3, 1994.

Appellants have been denied permission to intervene in this action. It appears, therefore, that they lack standing to appeal the denial of the Rude 60(b) motion. *See Gottlieb v. Wiles*, 11 F.3d 1004, 1008-12 (10th Cir. 1993); *Croyden Assocs. v. Alleco*, Inc., 969 F.2d 675, 678-79 (8th Cir. 1992), *cert.*

denied, 113 S.Ct. 1251 (1993); *Guthrie v. Evans,* 815 F.2d 626, 627-28 (11th Cir. 1987). Although appellants may have standing to appeal the denial of their motion to intervene, the notice of appeal specifically states that they are appealing the April 12, 1994, denial of the Rule 60(b) motion. Consequently, it does not appear that appellants have standing to pursue this appeal. *See Wilson v. Firestone Tire & Rubber Co.,* 932 F.2d 510, 516 (6th Cir. 1991) (a party specifying a certain order in the notice of appeal is precluded from seeking review of other orders on appeal).

Appellants are hereby directed to show cause, within fourteen days of the entry of this order, why this appeal should not be dismissed for lack of jurisdiction.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

Leonard Green, Clerk,

/s/ Leonard Green

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al., Plaintiffs,	: C-1-91-256 : ORDER DENYING : PLAINTIFFS' : 60(b) MOTION
v.	:
PFIZER, INC, et al., Defendants.	:

This matter is before the Court on the Objector Plaintiffs' Fed. R. Civ. P. 60(B) motion (doc. 315), the Non-objecting Plaintiffs' Response (doc. 326), the Defendants' Response (doc. 327), and the Objectors' Reply (doc. 333).

On March 2, 1993, the Objectors filed a motion to reconsider this Court's approval of the settlement agreement of this class action. This complex and far-reaching settlement agreement was approved after exhaustive consideration and after the Court conducted fairness hearings on June 5, 8 and 9, 1992 and July 22, 1992. We have now thoroughly reconsidered our decision approving this settlement and conclude that after careful review of the Objectors' motion, and further review of our thorough 68 page Order approving the settlement, we hereby conclude that the interest of justice dictates that the Objectors' motion be, and is, hereby DENIED.

SO ORDERED.

Dated: April 12, 1994

/s/ S. Arthur Spiegel

S. Arthur Spiegel
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al.	:	C-1-91-256
	:	
Plaintiffs,	:	
	:	ORDER
v.	:	
	:	
PFIZER, INC., et al., SHILEY, INC.	:	
Defendants.	:	

This matter is before the Court on the Objecting Pennsylvania Class' ("Movant") Motions to Intervene (doc. 265) and (doc. 267). The Movent [sic] sought leave from this Court to intervene in this action. The Court declined to rule on the motions to intervene, finding that the Court lacked jurisdiction as a notice of appeal had already been filed. The Sixth Circuit affirmed that ruling and by separate order held that the Movent [sic], as unnamed class members who had neglected to intervene in a timely fashion, lacked standing to pursue their appeal objecting to the settlement.

Accordingly, because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class, in the interest of justice, we hereby DENY the Movant's motions to intervene.

SO ORDERED

Dated April 5, 1994

/s/ Arthur Spiegel
S. Arthur Spiegel
United States District Court

No. 92-3973

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al., Plaintiffs-Appellees,	)	FILED DEC 21, 1993 LEONARD GREEN, Clerk
ELIZABETH W. RIDGEWAY, et. al., Appellants,	)	
v.	)	ORDER
PFIZER, INC., et al. Defendants-Appellees.	)	NOT RECOMMENDED FOR FULL TEXT PUBLICATION*

* Sixth Circuit Rule 24 limits citations to specific publications. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is to be reproduced.*

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

Elizabeth W. Ridgeway, Rosemary Grunsby, and Fred Grunsby appeal the district court's order approving the settlement of this product liability class action suit. Defendants Pfizer, Inc. and Shiley, Inc. move to dismiss, pursuant to Fed. R. App. P. 27, for lack of jurisdiction.

Because the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal. *See Guthrie v. Evans,* 815 F.2d 626, 627-28 (11th Cir. 1987); *see also Croyden Assocs. v. Alleco, Inc.,* 969 F.2d 675. 678-79 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 1251. (1993); *Walker v. City of Mesquite,* 858 F. 2d 1071, 1073-75 (5th Cir. 1988). Therefore, the motion to dismiss this appeal is granted.

ENTERED BY ORDER OF THE COURT.

/s/ Leonard Green
Clerk

No. 92-3973
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al. Plaintiffs-Appellees,	)	FILED MAR 4, 1994 LEONARD GREEN,
ELIZABETH W. RIDGEWAY, et al., Appellants,	)	Clerk
v.	)	ORDER
PFIZER, INC., etc., et al., Defendants-Appellees.	)	

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT.

/s/ Leonard Green
Leonard Green, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 3, 1994

Mr. Arthur H. Bryant
1717 Massachussets Ave., N.W.
Suite 800
Washington, DC 20036

Re: Elizabeth Ridgeway, et al.
v. Pfizer, Inc., et al.
No. 93-1912

Dear Mr. Bryant:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied. Justice O'Connor took no part in the consideration or decision of this petition.

Very truly yours,

William K. Suter, Clerk

No. 92-4297

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al.	)	FILED
	)	DEC 21, 1993
Plaintiffs-Appellees,	)	LEONARD GREEN,
	)	Clerk
ELIZABETH W. RIDGEWAY,	)	
et al.,	)	ORDER
	)	
Class Members-Appellants.	)	NOT RECOMMENDED FOR
	)	FULL TEXT PUBLICATION*
v.	)	
	)	
PFIZER, INC.; et al.	)	
Defendants-Appellees.	)	

* Sixth Circuit Rule 24 limits citations to specific publications. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is to be reproduced.*

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; LIVELY, Senior Circuit Judge.

Elizabeth W. Ridgeway, Rosemary Grunsby, and Fred Grunsby appeal the district court's order declining to rule on their belated motion to intervene in this class action. The appellants are unnamed class members who object to the settlement that has been reached between the plaintiff class, represented by Arthur Ray Bowling, and the defendants, Pfizer, Inc., et al. The sole issue in this appeal is whether the district court had jurisdiction to decide the appellant's motion to intervene, which was filed after their notice of appeal was filed. The members of the panel unanimously agree that oral argument is not needed. Fed. R. App. 34(a).

On September 10, 1992, the district court issued a sixty-four page opinion approving the settlement of the class action litigation. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992). The appellants filed a notice of appeal on September 17,

1992, and then on September 24, 1992, filed a motion to intervene in the distrrict court, Concluding that the notice of appeal divested it of jurisdiction, the district court declined to rule on the motion to intervene. The appellants now contend that under *United Airlines v. McDonald,* 432 U.S. 385 (1977), a district court retains jurisdiction to consider a motion to intervene even after a notice of appeal has been filed. We disagree.

In *McDonald,* the Supreme Court held that putative class members could intervene for the purpose of taking an appeal of the denial of class certification even though their motion was made after entry of a final judgment. *Id.* at 394-95. In *McDonald,* however, the unnamed class members moved to intervene *before* filing a notice of appeal. *Id.* at 390. In contrast, the appellants filed their motion to intervene *after* filing a notice of appeal.

As a general rule, a notice of appeal deprives the district court of jurisdiction over the action and transfers jurisdiciton to the appellate court, *Lewis v. Alexander,* 987 F.2d 392, 394 (6th Cir. 1993). In *Roe v. Town of Highland,* 909 F.2d 1097, 1100 (7th Cir. 1990), the Seventh Circuit held that there simply was no action in which a putative class member could intervene where she filed her motion to intervene on the same day that she filed her notice of appeal. We agree, and we conclude that because the appellant's notice of appeal divested the district court of jurisdiction, the district court quite correctly declined to rule on the motion.

Therefore, the district court's order is affirmed.

ENTERED BY ORDER OF THE COURT.

/s/ Leonard Green
Clerk

Case No. 94-3519

United States Court of Appeals
For the Sixth Circuit

Bowling, et al. v. Ridgeway

ISSUES TO BE RAISED ON APPEAL

1. Whether the court below erred in reconsidering its decision approving the class action settlement.

2. Whether the court below ignored or misapprehended the record when it ruled that the new facts and issues raised in Appellants' Rule 60(b) Motion had already been considered by it, when the record shows that the new facts and issues could not have been considered by the court because Appellees, (the proponents of the class action settlement) had not been truthful in providing the Court with information which the Court had relied upon in its order approving the class action settlement and class certification; and the record shows further that the new facts and issues raised in the 60(b) Motion had been kept secret and hidden from the court by the Proponents during the Fairness Hearings.

3. Whether the court below erred in failing to consider newly found evidence raised in Appellants' Rule 60(b) Motion of Defendants' fraudulent "Good Manufacturing Practices" upon the Food and Drug Administration relating to Defendants' heart valves.

4. Whether the court below erred in failing to consider newly found evidence that Appellees misled the court about whether the Courts of California would allow persons with heart valves in other states to sue the Defendants in California.

5. Whether the court below erred in failing to consider newly found evidence raised in Appellants' Rule 60(b) Motion concerning the Appellees' failure to provide the court below with a true account of Defendants' prior medical research activities and the impact of such research on the terms of the class action settlement.

6. Whether the court below erred in failing to address the issue raised in Appellants' Rule 60(b) Motion that the Defendants misled the court and the class concerning Defendants' unwillingness to settle "pre-fracture" cases for substantial sums.

7. Whether the court below erred in failing to address the issue raised in Appellants' Rule 60(b) Motion concerning Defendants failure to reveal the existence of criminal and civil investigations by the United States Department of Justice into Defendants' acts of fraud in connection with Defendants' heart valve related activities.

8. Whether the court below erred in failing to address the issue raised in Appellants' Rule 60(b) Motion that Class Counsel misrepresented to the court the extent of the documents and other material he had access to and received prior to agreeing to the terms of the class action settlement and certification.

9. Whether the court below erred in denying the Appellants request that it issue a certification requesting a remand for purposes of ruling on Appellants' Rule 60(b) Motion, as authorized in *Bank of Salem, Ohio v. Hirsch*, 535 F.2d 434 (6th Cir. 1976).

10. Whether the court below failed to conduct the required inquiry and otherwise erred in the procedure and process it utilized in determining whether to issue a certification requesting a remand for purposes of ruling on Appellants' Rule 60(b) Motion as authorized in *Bank of Salem, Ohio v. Hirsch*, 535 F.2d 434 (6th Cir. 1976).

11. Whether the court below erred in the procedure and process it utilized to consider Appellants' request that it issue a certification authorizing a remand of this case from the Sixth Circuit Court of Appeals when it undertook no inquiry and allowed no hearings.

(2)

No. 94-843

Supreme Court, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

—v.—

PFIZER INC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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7/19

QUESTIONS PRESENTED

Should this Court grant review where the petition for certiorari substantially repeats the arguments petitioners raised in their previous petition for certiorari in this case (No. 93-1912), which this Court denied on October 3, 1994, *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994)—particularly where, following denial of certiorari, the district court has begun implementing the settlement desired by the class representatives and the overwhelming majority of the class?

Did the Court of Appeals err in dismissing for lack of standing petitioners' appeal from an order denying their motion under Fed. R. Civ. P. 60(b) to vacate a judgment finding a class action settlement to be fair, adequate and reasonable, where:

- the petitioners had previously appealed from that judgment, their previous appeal was dismissed for lack of standing, and certiorari was denied by this Court;
- petitioners' appeal from the denial of their motion to vacate the judgment is a stratagem to overcome their lack of standing to appeal the judgment directly;
- the petitioners are non-party class members who deliberately chose to join the settlement class after studying the settlement terms, rather than exercise their opportunity to opt out and pursue their long-standing action pending in another court;
- petitioners neglected to file a motion to intervene until after they had already filed their first notice of appeal, which divested the district court of jurisdiction to consider that motion; and
- after dismissal of petitioners' first appeal, the district court denied petitioners' motion to intervene

because the class would be prejudiced by any further delay in implementing the settlement, and no appeal from that order was taken?

Have petitioners' numerous, and in some instances untimely, filings in all three levels of the federal courts created a procedural context peculiar to this case which makes it unsuitable for review by this Court?

RULE 29.1 LISTING

Respondent Shiley Incorporated is a wholly-owned subsidiary of respondent Pfizer Inc. Shiley Incorporated has no subsidiaries that are not wholly owned.

Respondent Pfizer Inc has no parent company. The following is a list of its direct or indirect subsidiaries (except those that are wholly owned):

Subsidiary	*Place of Incorporation*
Pfizer Biogal L.L.C.	Hungary
Pfizer Egypt S.A.E.	Egypt
Pfizer Limited	Ghana
Pfizer Limited	India
Dumex Limited	India
Duchem Laboratories Limited	India
PT Pfizer Indonesia	Indonesia
Livestock Feeds PLC	Nigeria
Pfizer Products PLC	Nigeria
Pfizer Laboratories Limited	Pakistan
Pfizer Korea Limited	South Korea
Pfizer Pharmaceuticals Ltd.	People's Republic of China

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

RULE 29.1 LISTING iii

TABLE OF AUTHORITIES vi

ADDITIONAL OPINION BELOW 3

STATUTES AND RULES INVOLVED 3

STATEMENT OF THE CASE 3

The Class Action Settlement 4

Petitioners' Four Appeals, Prior Certiorari Petition and Post-Appeal Motions 7

REASONS FOR DENYING THE WRIT 11

I. THIS COURT'S DENIAL OF PETITIONERS' FIRST PETITION FOR CERTIORARI AND THE SUBSEQUENT IMPLEMENTATION OF THE SETTLEMENT REQUIRE THAT, IN THE INTEREST OF FINALITY, CERTIORARI BE DENIED 11

II. THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF APPELLATE STANDING ESTABLISHED BY THIS COURT AND CONSISTENTLY FOLLOWED BY THE COURTS OF APPEALS 12

PAGE

III. THE DECISION BELOW IS SUPPORTED BY THE TEXT OF THE FEDERAL RULES AND THE POLICIES UNDERLYING THE CLASS ACTION PROCEDURE..... 16

IV. WHERE PETITIONERS' APPEAL FROM A JUDGMENT WAS DISMISSED FOR LACK OF STANDING AND CERTIORARI WAS DENIED, PETITIONERS MAY NOT OVERCOME THEIR LACK OF STANDING BY APPEALING FROM AN ORDER REFUSING TO VACATE THAT SAME JUDGMENT 22

V. PETITIONERS' NUMEROUS MISFILINGS HAVE CREATED A PROCEDURAL CONTEXT WHICH MAKES THIS CASE UNSUITABLE FOR REVIEW BY THIS COURT..... 24

VI. PETITIONERS' "DUE PROCESS" ARGUMENT WAS NOT RAISED BELOW, IS MERITLESS AND DOES NOT DESERVE REVIEW BY THIS COURT..... 28

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases: PAGE

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 18

Angus v. Shiley Inc., 989 F.2d 142 (3d Cir. 1993) 26

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 28

Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993) 14

Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992) .....*passim*

Brinkman v. Shiley, Inc., 732 F. Supp. 33 (M.D. Pa.), *aff'd*, 902 F.2d 1558 (3d Cir. 1989) 26

Broyhill Furniture Industries, Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1085 (Fed. Cir. 1993) 23

Carlough v. Amchem Products, Inc., 5 F.3d 707 (3d Cir. 1993) 14, 15

Cohen v. Young, 127 F.2d 721 (6th Cir. 1942) 29

Croyden Associates v. Alleco, Inc., 969 F.2d 675 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993) .....*passim*

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).. 28

In re Dennis Greenman Securities Litigation, 829 F.2d 1539 (11th Cir. 1987) 13

E.I. DuPont de Nemours & Co. v. Train, 430 U.S. 112 (1977) 15

PAGE

Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993).....*passim*

Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987) .....*passim*

Hansberry v. Lee, 311 U.S. 32 (1940) 18

Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Phillips Corp., 114 S. Ct. 425 (1993) 16

Kem Manufacturing Corp. v. Wilder, 817 F.2d 1517 (11th Cir. 1987) 23

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 25

Loran v. Furr's/Bishop's Inc., 988 F.2d 554 (5th Cir. 1993).....12, 13

Marino v. Ortiz, 484 U.S. 301 (1988).....*passim*

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) . 18

Rice v. Sioux City Memorial Park Cemetery, Inc., 34 U.S. 70 (1955) 25

Ridgeway v. Pfizer, Inc., 115 S. Ct. 294 (1994) 1, 9, 11

Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council, 459 F.2d 579 (6th Cir. 1972) 29

Shores v. Sklar, 844 F.2d 1485 (11th Cir. 1988).....12, 13

Shults v. Champion International Corp., 35 F.3d 1056 (6th Cir. 1994) .....*passim*

Ticor Title Insurance Co. v. Brown, 114 S. Ct. 1359 (1994) 25

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 22

PAGE

United States v. Mendoza, 464 U.S. 154 (1984) 15

In re VMS Limited Partnership Securities Litigation, 976 F.2d 362 (7th Cir. 1992) 13

Walker v. City of Mesquite, 858 F.2d 1071 (5th Cir. 1988) ..... *passim*

Youakim v. Miller, 425 U.S. 231 (1976) 28

Statutes and Rules:

28 U.S.C. § 1254(1) 16

28 U.S.C. § 1291 30

Fed. R. App. P. 3 3

Fed. R. App. P. 3(c) 12, 16

Fed. R. App. P. 4(a)(5) 27

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Civ. P. 23(a)(4) 20

Fed. R. Civ. P. 23(b)(2) 25

Fed. R. Civ. P. 23(b)(3) 13, 19, 25

Fed. R. Civ. P. 23(c)(1) 5

Fed. R. Civ. P. 23(c)(2) 5, 17

Fed. R. Civ. P. 23(d) 16, 17

Fed. R. Civ. P. 23(e) 5, 6

Fed. R. Civ. P. 23.1 14

Fed. R. Civ. P. 24 ..... 3, 17

Fed. R. Civ. P. 59(e) 9

PAGE

Fed. R. Civ. P. 60(b) ..... *passim*

Fed. R. Civ. P. 60(b)(2) 8, 23

Fed. R. Civ. P. 60(b)(3) 8, 23

Fed. R. Civ. P. 60(b)(6) 8, 23

Supreme Court Rule 10.1 25

Miscellaneous:

Advisory Committee Notes on the 1966 Amendments to Fed. R. Civ. P. 24 17

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356 (1967) 17

Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933 (1993) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-843

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

—against—

PFIZER INC, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

The Petition for a Writ of Certiorari raises the same purported issue as petitioners' previous petition for certiorari in this case (No. 93-1912), which was denied by this Court on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994). Now that petitioners' four separate appeals have been dismissed or summarily rejected on the merits and their prior petition for certiorari has been denied, implementation of the class settlement has begun. The time has come to put an end to this litigation.

The first petition for certiorari sought review of a Court of Appeals decision dismissing, for lack of appellate standing, petitioners' appeal from a judgment approving a class settlement. The Court of Appeals dismissed that appeal based on

settled principles of appellate standing established by this Court and consistently applied by the Courts of Appeals, and this Court denied certiorari.

Because they lacked standing to appeal from the judgment directly, petitioners sought to appeal from an order refusing to vacate that same judgment. The Court of Appeals dismissed that appeal for lack of standing as well, and the latest petition for certiorari seeks review of that determination.

The new petition should be denied as the last one was. Petitioners are non-party class members who passed up repeated opportunities to exclude themselves from the class and pursue their own action pending against the defendants in state court. They never became parties to the litigation: they did not move to intervene in the district court until after they had already filed a notice of appeal and had thereby divested the district court of jurisdiction. And after the district court regained jurisdiction and denied petitioners' untimely intervention motion, petitioners failed to appeal from that denial.

If petitioners had made a timely motion to intervene and intervention had been granted, the question of standing to appeal would not have arisen. On the other hand, if a timely motion to intervene had been denied, appellate standing could have been assessed in light of the district court's reasons for denying intervention.

Petitioners' actions have created a unique procedural setting that is unlikely ever to be repeated, rendering this case unsuitable for review by this Court. In addition, justice would not be served by interrupting at this late stage the delivery of health care and monetary benefits to the thousands of class members who need and want them. Certiorari should be denied.

ADDITIONAL OPINIONS BELOW

The decision of the district court, from which appeal was taken, appears in petitioners' appendix at 5a. The district court's initial opinion on petitioners' Rule 60(b) motion is reproduced in the appendix hereto at 5a.

STATUTES AND RULES INVOLVED

The petition involves the following rules: Rules 23, 24 and 60(b) of the Federal Rules of Civil Procedure and Rule 3 of the Federal Rules of Appellate procedure. The pertinent provisions of these rules are set forth in the appendix hereto.

STATEMENT OF THE CASE

This class action was settled on terms satisfactory to the defendants, the class representatives and the overwhelming majority of class members. Following denial of petitioners' prior certiorari petition, the district court has begun implementing the settlement, bringing health care and monetary benefits to tens of thousands of class members who desire them.

Petitioners' efforts to overturn the settlement have cluttered every level of the federal courts with meritless filings. Petitioners filed post-appeal motions to intervene in the district court (and a motion for reconsideration of the denial of intervention), a motion in the district court to vacate the judgment under Rule 60(b), four separate appeals (all of which were dismissed or summarily rejected on the merits), and two petitions for certiorari.

Of some 50,000 class members, only the three petitioners seek to overturn the settlement. The other class members are satisfied. Yet petitioners had full opportunity to exclude themselves from the class *after* they studied the settlement terms. They chose to remain class members. Then, after the district

court entered a judgment approving the settlement as fair, adequate and reasonable, they filed a notice of appeal. The Court of Appeals dismissed the appeal on the ground that petitioners—having failed to become parties by intervening in the district court—lacked standing to appeal. This Court denied certiorari on October 3, 1994.

Seeking to circumvent the Court of Appeals' determination that they lacked standing to appeal the judgment approving the settlement, petitioners then tried to appeal from a district court order refusing to vacate the judgment approving the settlement. Petitioners' latest petition for certiorari is from the Court of Appeals' judgment dismissing that appeal.

The Class Action Settlement

This action was brought on April 19, 1991 on behalf of recipients of a Shiley artificial heart valve, and their spouses. Artificial heart valves, made of metal and synthetic materials, are surgically implanted to replace diseased and failing human heart valves. Respondent Shiley was a pioneer in developing artificial heart valves, which have saved tens of thousands of lives.

The artificial heart valves implanted in the class members continue to function as expected to sustain their lives without adverse incident. The class members' claims are *not* based upon any failure or malfunction of their valves, but solely upon their alleged concern about the small chance of malfunction sometime in the future. At the time the action was settled, such claims—to recover for alleged anxiety about a working device—had been rejected as a matter of law by some 27 courts around the country, including the Courts of Appeals for the Third, Fourth, Fifth, Eighth and Ninth Circuits. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 147, 162-63, 165 (S.D. Ohio 1992).[1] The class settlement provides not only

[1] As the district court observed, "[o]ne California court allowed the plaintiff with a properly functioning heart valve past the summary

cash payments, but also medical and health benefits which the overwhelming majority of class members—many of whom are aged and ill from underlying heart disease—desire to receive.

Settlement negotiations between defendants and the class representatives began in July 1991, and culminated in the execution of an agreement on January 23, 1992. (Record ("R.") 48, attachment).[2] As authorized by Fed. R. Civ. P. 23(c)(1), the district court then conditionally certified the class for purposes of settlement.[3] (R. 43). Pursuant to Fed. R. Civ. P. 23(c)(2) and (e), the court approved the notice of the settlement to be provided to class members.[4] (R. 44). At a cost of

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judgment stage of litigation, based on a fraud theory." *Bowling*, 143 F.R.D. at 147.

Although many of the cases were dismissed, artificial heart valve litigation around the country and related publicity generated "an increasing number of critical news stories and reports." *Id.* As a result, "voluminous information" about the valve was available to class counsel. *Id.* at 161.

[2] Citations to the record are to the district court docket numbers. Contrary to the petition (Pet. at 3), important terms of the settlement had not yet been negotiated at the time of the November 19, 1991 court conference. (R. 33). The district court sealed the transcript "because news of the settlement negotiations might have had ramifications on Pfizer's publicly traded stock"; and the district court found petitioners' allegations to the contrary—repeated in the petition (Pet. at 3-4)—to be "specious." *Bowling*, 143 F.R.D. at 156.

[3] Fed. R. Civ. P. 23(c)(1) provides that an order certifying a class action "may be conditional."

Petitioners state that the conditionally certified class was broader than that alleged in the original complaint. (Pet. at 4). They fail to mention that the complaint was amended to allege the broader class. (R. 47).

[4] Fed. R. Civ. P. 23(c)(2) provides that "the court shall direct to the members of the class the best notice practicable under the circumstances" which "shall advise each member that (A) the court will exclude the member from the class if the member so requests . . .; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel." Fed. R. Civ. P. 23(e) provides that "notice of [a] proposed dismissal or com-

some $4 million, notice was mailed to every valve recipient for whom an address was known and was published in over 200 leading publications throughout the world. (R. 162, Pines Affidavit Exs. A, B; R. 202 at 26). The notice informed each class member of the opportunity to opt out of the class. (R. 44, Exs. A, B).

The three petitioners—two valve recipients and one spouse—are the named plaintiffs in an uncertified class action filed in 1986 against the defendants in the Pennsylvania Court of Common Pleas (*Taylor v. Shiley, Inc.*, No. 2087). In February 1992, petitioners received notice of the class settlement in this case through their counsel, and were thus expressly informed of their opportunity to exclude themselves from the class. Notwithstanding the fact that they had their own pending case against defendants, they elected to remain in the class. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 155-56 (S.D. Ohio 1992).

Petitioners state that if they "opted out of the *Bowling* class, they couldn't object to class certification, the *Bowling* settlement, or participate in the Fairness Hearing . . . ." (Pet. 5). This is untrue. On May 19, 1992, before the opt out deadline, the district court told petitioners that they were free to opt out and also press their objections to the settlement. (R. 140 at 28; R. 202 at 8). As the district court stated in its opinion, petitioners' counsel "was free to have opted its clients out, and then could have voiced its objections to the proposed settlement at the fairness hearing." *Bowling*, 143 F.R.D. at 156. Petitioners turned this opportunity down, as well as two other opportunities—on June 9 and July 22, 1992—to opt out *after* they had appeared and objected to the settlement. (R. 208 at 92-95; R. 251 at 82-83).

Pursuant to Fed. R. Civ. P. 23(e), the district court conducted a fairness hearing on the proposed settlement on June

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promise shall be given to all members of the class in such manner as the court directs."

5, 8, 9 and July 22, 1992. Petitioners, other class members and consumer advocacy groups were heard at length. As a result of suggestions by the court and counsel, the initial settlement agreement was substantially enhanced. Except for petitioners, all class members who were represented by counsel then withdrew their objections. Consumer advocate *amici* also withdrew their objections in view of the enhancements. (*See* R. 251 at 56-61).

On August 19, 1992, the district court issued a 68-page order finding that the settlement is "fair, adequate and reasonable." *Bowling*, 143 F.R.D. at 170. Judgment was entered on September 10, 1992. (R. 255). Petitioners filed a notice of appeal from that judgment on September 17, 1992. (R. 258). At no time prior to their filing of a notice of appeal did petitioners move to intervene.

The three petitioners were the *only* class members who continued to express dissatisfaction with the judgment approving the settlement.[5] Yet petitioners did not ask any court to relieve them personally from that judgment. Instead, petitioners—who represent no one but themselves—sought to *overturn* the judgment that tens of thousands of their fellow class members desire.

Petitioners' Four Appeals, Prior Certiorari Petition and Post-Appeal Motions

On September 25, 1992, eight days after they had filed their first notice of appeal, petitioners belatedly filed a motion in the district court to intervene for purposes of appeal. (R. 265). By memorandum decision dated November 9, 1992, the district court concluded that it could not decide the motion to intervene because the filing of the notice of appeal had

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[5] Although at times petitioners have purported to speak on behalf of all members of the uncertified class in *Taylor*, their petition for certiorari is brought solely on their own behalf and not on behalf of the uncertified *Taylor* class.

divested it of jurisdiction. (R. 297). Petitioners appealed from that decision as well. (R. 305).

On March 2, 1993, while the above appeals were pending, petitioners filed a motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b)(2), (3) and (6). (R. 315). By Order dated March 26, 1993, the district court examined each of the asserted grounds for the Rule 60(b) motion and concluded that there was no basis for it to request a remand from the Court of Appeals. (App. at 5a). The court held that some of the matters raised in the motion "were already considered" in approving the settlement; "[m]any of the 'newly discovered' matters . . . were actually known by [petitioners], or with reasonable diligence could have been discovered at the time of the fairness hearing"; and "[w]hen th[e] Court held its fairness hearing, [it] was well aware that some Plaintiffs' counsel had accused the Defendants of fraud" and it took this accusation into account when it approved the settlement. (App. at 9a-11a). Petitioners appealed. (R. 337). On June 9, 1993, the Sixth Circuit dismissed that appeal because the district court's order declining to request a remand from the Court of Appeals was not an appealable order.

On December 21, 1993, the Sixth Circuit affirmed the district court's order concluding that it lacked jurisdiction to rule on a motion to intervene filed in the district court after a notice of appeal. Petitioners did not seek certiorari with respect to that decision.

Also on December 21, 1993, the Court of Appeals issued an order dismissing petitioners' appeal from the judgment approving the class settlement. The Court held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." (Pet. App. at 7a). In support of its decision, the Court cited *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987), *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993),

and *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988)—all of which held that non-party class members do not have standing to appeal. On March 4, 1994, the Court of Appeals denied a petition for rehearing *en banc*.

Petitioners then filed a petition for certiorari. This Court denied certiorari on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994).

After the petitioners' appeal was dismissed and the district court regained jurisdiction, it ruled on the pending motions. On April 5, 1994, the court denied the motion to intervene "because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class." (Pet. App. at 6a). Petitioners did not appeal from that order. Instead, on April 13, 1994, they filed a motion in the district court under Fed. R. Civ. P. 59(e) for reconsideration of the denial of their motion to intervene. (R. 371).

On April 12, 1994, the district court denied petitioners Rule 60(b) motion. The Court stated: "We have now thoroughly *re*considered our decision approving this settlement and conclude that after careful review of the Objectors' motion, and further review of our thorough 68 page Order approving the settlement, we hereby conclude that the interest of justice dictates that the Objectors' motion [under Rule 60(b)] be, and is, hereby DENIED." (Pet. App. at 5a).

On May 3, 1994, petitioners filed an appeal from the district court's denial of their motion to vacate the judgment. (R. 379). Having previously ruled that petitioners lacked standing to appeal from that same judgment, the Court of Appeals issued an order on May 17, 1994 requiring petitioners to show cause why the appeal should not be dismissed. (Pet. App. at 3a). Petitioners then moved the Court of Appeals to stay the appeal and remand to the district court for a ruling on their motion for reconsideration of the denial of their motion to intervene.

On August 8, 1994, the Court of Appeals issued the order, for which certiorari is now sought, which dismissed the appeal from the denial of petitioners' motion to vacate the judgment. The Court reasoned that because petitioners were non-party class members whose motion to intervene had been denied, they lacked standing to appeal from the denial of a motion seeking "to vacate the very settlement as to which this court earlier concluded the [petitioners] lacked standing to challenge." Petitioners' motion for a remand was denied as moot.

On November 23, 1994, the district court denied the petitioners' motion for reconsideration of the denial of their motion to intervene, holding that "[t]o postpone the benefits of the settlement for another round of appeals would . . . be prejudicial to the members of the class." (App. at 18a). The court explained:

> "*Certiorari* has been denied, all appeals have been exhausted and the judgment of this Court approving the settlement is final. The parties . . . are moving toward the implementation of the settlement and the class members will soon begin to enjoy the benefits of their lawsuit. The [petitioners] ha[ve] delayed the implementation of the settlement for over two years with their series of appeals. . . . The admitted aim of the [petitioners'] motions is to be allowed to intervene in order to file another round of appeals, which would again significantly delay the implementation of the settlement. The [petitioners] ha[ve] had an opportunity to make their objections to the settlement and those objections have been carefully considered. It is time now for the implementation of the settlement for the benefit of the Plaintiffs' Class. The tens of thousands of class members who are waiting for the settlement's benefits have waited long enough." (App. at 14a-15a).

In addition, the district court again addressed the "inflammatory accusations" in petitioners' Rule 60(b) motion, noting that "we have heard many of these arguments before from [petitioners], others are based on the [petitioners'] continued misunderstanding of the details of the settlement, and some are based on 'new evidence' which in fact was brought forward by the parties and considered by the Court in the process of approving the settlement." (App. at 21a).

REASONS FOR DENYING THE WRIT

I. THIS COURT'S DENIAL OF PETITIONERS' FIRST PETITION FOR CERTIORARI AND THE SUBSEQUENT IMPLEMENTATION OF THE SETTLEMENT REQUIRE THAT, IN THE INTEREST OF FINALITY, CERTIORARI BE DENIED.

The petition for writ of certiorari is little more than a reiteration, often *verbatim*, of petitioners' previous certiorari petition (No. 93-1912), which this Court denied. *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994). For example, the latest petition contains the same meritless contention that there is a "split" among the circuits as to the appellate standing of non-party class members; it relies on the substantially the same cases; it makes the same policy arguments; and it asserts the same supposed "due process" violations. The tables of contents in the two petitions are virtually identical.

Petitioners should not be permitted to raise the same issues again and again in repetitive certiorari petitions in the same case. After this Court denied the first petition for certiorari, the district court began implementing the settlement. If the thousands of class members are to receive the substantial medical and monetary benefits that are due them, litigation must finally come to an end. Certiorari should be denied for this reason alone.

Nonetheless, because petitioners reiterate the arguments they raised in their first petition, we reiterate below, for the Court's convenience, our responses to those arguments.

II. THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF APPELLATE STANDING ESTABLISHED BY THIS COURT AND CONSISTENTLY FOLLOWED BY THE COURTS OF APPEALS.

As we pointed out in opposition to petitioners' prior certiorari petition, the issue raised has already been resolved by this Court. In *Marino v. Ortiz*, 484 U.S. 301, 304 (1988), the Court authoritatively ruled that "only parties to a lawsuit, or those that properly become parties [by intervening], may appeal an adverse judgment . . . ." The Court pointed out that the Federal Rules of Appellate Procedure provide that "[t]he notice of appeal shall specify the *party or parties* taking the appeal." Fed. R. App. P. 3(c) (emphasis added).

Marino affirmed dismissal of an appeal by a group of white police officers who appeared and objected to a proposed settlement of a class action brought by Hispanic members of the New York City Police Department. This Court held that the officers lacked standing to appeal, notwithstanding their participation in the proceedings below, because they "were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal." *Id.* at 304.

Following *Marino*, every Court of Appeals to be presented with an appeal from a class action judgment brought by non-party class members has ruled that non-party class members—like petitioners—do not have standing to appeal. *Shults v. Champion International Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993); *Walker v. City of*

Mesquite, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).[6]

Thus, for example, the Eighth Circuit observed that "*Marino* provides substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Croyden*, 969 F.2d at 679.

In their prior certiorari petition, petitioners argued without success that there is a supposed "split" among the Circuits. Petitioners now reiterate their meritless argument, relying on the same cases as before. However, as we pointed out in opposition to the prior petition, the cases that petitioners cite either were decided prior to *Marino*, or did not directly present the issue.

Not one of the post-*Marino* cases on which petitioners once again rely granted non-party class members standing to appeal from a judgment approving a settlement in a class action or from an order refusing to vacate such a judgment. In *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992), the Seventh Circuit held that non-party class members did *not* have standing to appeal a post-settlement order implementing a settlement agreement. The Court specifically stated that "we offer no opinion" as to whether non-party class members would have standing to appeal from a judgment approving the settlement. 976 F.2d at 368 n.8.

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[6] Petitioners cite *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987), a pre-*Marino* case, for the proposition that the Fifth and Eleventh Circuits permit non-party class members to appeal in Rule 23(b)(3) class actions. (Pet. at 16). This contention is specious. In *Greenman*, the issue of standing was not even raised. *See Croyden*, 969 F.2d at 678-79 (discounting the significance of *Greenman*). The Fifth and Eleventh Circuits subsequently held that non-party class members do *not* have appellate standing in Rule 23(b)(3) actions. *Loran*; *Shores*.

Similarly, *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993), cited by petitioners in both of its certiorari petitions, is tangential to the issue raised here. *Bell Atlantic* involved the appellate standing of an objecting shareholder in a shareholders' derivative action. The Court stated that "we need not decide whether different rules apply to objector appellate standing in class and derivative suits." 2 F.3d at 1307 n.4. Subsequently, the Tenth Circuit thoroughly analyzed *Bell Atlantic* and concluded that it was "inapposite" to the appellate standing of non-party class members, who differ from plaintiffs in shareholder derivative suits. *Gottlieb*, 11 F.3d at 1010.[7]

The final post-*Marino* case relied on by petitioners is *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993), where the Court—without even citing *Marino*—said that class members who timely moved to intervene would be able to appeal from a final judgment. However, unlike this case, *Carlough* was neither an appeal from a final judgment nor an appeal from an order refusing to vacate such a judgment. And, unlike this case, *Carlough* did not involve an appeal by a non-party class member who had failed to make a timely motion to intervene.

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[7] The Tenth Circuit explained why derivative suit cases such as *Bell Atlantic* are not on point:

> "[C]ases holding that an unnamed plaintiff in a shareholder derivative suit under Rule 23.1 has standing to appeal are inapposite. *See, e.g., Bell Atlantic* . . . . Rule 23.1 does not offer the same protective mechanisms offered by Rule 23. Unlike class actions under Rule 23, in shareholder derivative suits under Rule 23.1, a preliminary affirmative determination that the named plaintiffs will fairly and adequately represent the interests of the other class members is not a prerequisite to the maintenance of the action. . . . In addition, there is no opt out provision in shareholder derivative suits."

Gottlieb, 11 F.3d at 1010-11.

Rather, *Carlough* was an interlocutory appeal from the denial of the class members' motion to intervene; the Third Circuit dismissed the appeal on the ground that the denial of the motion to intervene was not immediately appealable. Thus, *Carlough* did not squarely present the issue raised by the petition.

As we pointed out in our opposition to the prior petition, it remains to be seen if the Third Circuit will find non-party class members to have standing to appeal from a class action judgment when that Court is actually presented with such an appeal and is asked to consider the issue in light of *Marino*. At the very least, because the Third Circuit has not yet had occasion to apply *Marino* to an appeal by a non-party class member who failed to file a timely motion to intervene, this Court would benefit by allowing the issue to mature. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (noting the benefits of permitting the Courts of Appeals "to explore a difficult question before this Court grants certiorari"); *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (noting "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

The Tenth Circuit surveyed the very same cases relied upon by petitioners and found that "there is no true conflict." *Gottlieb*, 11 F.3d at 1009. The Court stated: "We hold that standing [of a non-party class member to appeal] is dependent upon a grant of intervention, *a result which we believe to be consistent with the rule in all of the circuits that have directly addressed the issue . . . .*" 11 F.3d at 1006 (emphasis added).

The purported "conflict" described by petitioners in their prior petition, and reiterated here, is an illusion. There is no reason for this Court to grant review.

III. THE DECISION BELOW IS SUPPORTED BY THE TEXT OF THE FEDERAL RULES AND THE POLICIES UNDERLYING THE CLASS ACTION PROCEDURE

The decision below is supported by the language and underlying policies of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. In *Marino*, this Court relied on the text of the Federal Rules of Appellate Procedure in holding that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." 484 U.S. at 304. As the Court stated, Fed. R. App. P. 3(c) specifically requires that the notice of appeal specify the "party or parties" taking the appeal. *Id.*

This Court applied the same reasoning last Term in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Phillips Corp.*, 114 S. Ct. 425 (1993). There, the petitioner was a nonparty whose motion to intervene was denied by the Court of Appeals. This Court dismissed the writ of certiorari as improvidently granted because the petitioner lacked standing to seek review. The Court explained that the language of the statute creating the certiorari jurisdiction of this Court—28 U.S.C. § 1254(1)—speaks of "the petition of any *party* to any civil or criminal case . . . ." (Emphasis added).

The Sixth Circuit's decision, for which certiorari is sought, is also supported by the language of the class action and intervention provisions of the Federal Rules of Civil Procedure. As we pointed out in opposition to the first petition for certiorari, those provisions make clear that absent intervention, class members are *not* parties to the action, and do not have the unqualified right to participate at every stage of the litigation in the district court and on appeal.

Thus, Rule 23(d) provides that "the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given . . . of the opportunity of members . . .

to intervene . . . ." The Rule further states that the Court may "impos[e] conditions . . . on intervenors . . . ." As shown by these provisions, the district court has broad discretion under Rule 23 to consider whether, and on what terms, individual class members should be permitted to intervene consistent with the prompt and efficient management of the litigation. If class members were entitled to participate as parties in all aspects of the action even without intervention, then the provisions of Rule 23(d), giving the court authority upon a proper showing to permit *or deny* intervention by class members, and to impose conditions on intervenors, would be superfluous.

Consistent with the language of the Federal Rules, the Advisory Committee Notes on the 1966 Amendments to Fed. R. Civ. P. 24 state that "[a] class member who claims that his 'representative' does not adequately represent him, and is able to establish that proposition with sufficient probability . . . should, as a general rule, be entitled to intervene in the action." Thus, the Federal Rules contemplate that if non-party class members wish to participate as parties in a class action, they must first intervene.[8]

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[8] The Federal Rules distinguish between intervention and "entering an appearance through counsel." Any class member may "enter an appearance through counsel," Fed. R. Civ. P. 23(c)(2). This is not, however, the equivalent of intervention. As Professor Benjamin Kaplan, the reporter to the Advisory Committee, explains:

> "I read this 'appearance' as entitling counsel to receive the papers in the action to enable him to follow the case with a view to deciding, *e.g.*, whether he should move to intervene. If 'appearance' is read as enabling the class member to be admitted automatically into the action as a party, it would stand in odd contrast to intervention in the action under Rule 24, which is not automatic and requires a showing."

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 392 n.137 (1967).

Moreover, automatically permitting all non-party class members to appeal would be impractical and antithetical to the policies and purposes of Rule 23. Rule 23 sets forth a procedure through which common issues can be efficiently litigated in a single suit "when there are too many plaintiffs for proper joinder." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). The rule seeks to *avoid* unmanageable activity of numerous parties by providing for a " 'representative' suit to which some members of the class are parties, [who] may bind members of the class or those represented who were not made parties to it." *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). As this Court has explained:

> "A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions."

American Pipe & Construction Co. v. Utah, 414 U.S. 538, 550 (1974). Accordingly, Rule 23 is structured to provide each class member with "procedural due process protection[s]" without being "fully a party in the traditional sense." *Shutts*, 472 U.S. at 808, 811-12.

The goals of manageability and efficiency would be compromised if each class member could individually decide to appeal. As the Eleventh Circuit explained:

> "A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits. . . . If each class member could appeal individually, the litigation could become unwieldy. Thus, allowing direct appeals by individual class members who have not intervened in the district court *would defeat the very purpose of class action lawsuits*."

Guthrie v. Evans, 815 F.2d 626, 629 (11th Cir. 1987) (emphasis added); *accord Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1074 (a non-party class member may not appeal absent intervention in the court below; "a contrary rule would result in the frustration of the purpose behind class litigation"); *Gottlieb*, 11 F.3d at 1009 ("If individual appeals without formal intervention were to be permitted, the class action would break down under the burden of unpredictable and unlimited individual actions. Such a result would directly conflict with the goals of Rule 23 and would eviscerate the utility of the class action suit.").

The Courts of Appeals have also pointed out that permitting appeals by non-party class members would be inconsistent with the representative nature of class actions. *Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1073; *Guthrie*, 815 F.2d at 628. The problem is underscored by this case. The class representatives, who were determined by the district court to be adequate, are satisfied with the judgment and want its benefits now. Petitioners, who represent no one but themselves, seek to overturn that judgment against the wishes of the class representatives and the overwhelming majority of the class. "It is particularly appropriate" to dismiss an appeal by a non-party class member when the "class member's challenge to the adequacy of a settlement is contrary to the view of all the other class members." *Croyden*, 969 F.2d at 680.

Moreover, automatically permitting appeals by non-party class members without intervention is unnecessary to protect the class members' individual interests. In Rule 23(b)(3) actions, such as this, class members can protect their interests by exercising their right to opt out and pursue their own actions. *Croyden*, 969 F.2d at 678; *Guthrie*, 815 F.2d at 628; *Gottlieb*, 11 F.3d at 1009. Alternatively, if individual class members believe that they are not represented adequately by the class representatives, they can protect their interests by moving to intervene; or they can seek to avoid the effect of an adverse judgment by collateral attack. *Croyden*, 969 F.2d at

678; *Walker*, 858 F.2d at 1073-74; *Guthrie*, 815 F.2d at 628; *Shults*, 35 F.3d at 1058.[9] "With these legal avenues available for individual class members, there is no need to permit an individual to appeal a judgment with which the class representatives, and presumably the majority of the class members are satisfied." *Guthrie*, 815 F.2d at 628; *Croyden*, 969 F.2d at 678.

Petitioners ignore both the language of the Federal Rules and the policies underlying class actions set forth in decisions of this Court and the Courts of Appeals.[10] Instead, petitioners assert incorrectly—as they did in their prior unsuccessful petition—that "an appeal is often the only mechanism by which an absent class member can protect his or her rights." (Pet. at 14). They once again assert that the right to opt out does not provide adequate protection, because class claims are "frequently" too small to justify individual litigation. But neither the Court below nor any other Circuit has held that a class member may never appeal; they merely held that intervention is a precondition. Certainly, any class member with the wherewithal to appeal will also have the wherewithal to file a motion to intervene and assert any basis for contending

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[9] Petitioners are completely off base in arguing that the Sixth Circuit in *Shults* "apparently would allow an unnamed class member . . . standing to appeal if . . . he could prove factually a violation of Fed. R. Civ. P. 23(a)(4) (adequacy of representation)." (Pet. at 17). To the contrary, *Shults* emphasized that claims of inadequacy of representation should be addressed by motions to intervene or collateral attack, and that there is "no persuasive authority for th[e] proposition" that non-party class members should have "standing to appeal, independent of any other grounds, [where] the class representatives afforded them inadequate representation." 35 F.3d at 1058, 1061.

[10] Petitioners rely heavily, as they did in their last certiorari petition, on a law review note, Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933 (1993). The Tenth Circuit has stated that it "disagree[s] with this student's analysis," *Gottlieb*, 11 F.3d at 1012 n.7, as does every Court of Appeals to have squarely addressed the issue since *Marino* was decided.

that class representation is inadequate. Moreover, petitioners' argument is quite beside the point on the facts of this case: the petitioners *did* have their own pending separate action against the defendants, which they had been pursuing since 1986; they had repeated opportunities to opt out in order to continue pursuing that action; and they chose not to avail themselves of those opportunities.

Next, petitioners state that the intervention requirement will have "the practical effect of drastically limiting the availability of appellate review" of judgments in class actions. (Pet. at 19). The gravamen of petitioners' argument is that motions to intervene will often be denied (a) because the class members are already adequately represented by the class representatives, or (b) because the class members can protect their rights by opting out. (Pet. at 21-22).

Petitioners' generalizations about whether motions to intervene will be granted or denied are speculative at best. In this case, because petitioners failed to file a timely motion to intervene, it is impossible to determine whether the district court would have granted or denied a motion to intervene filed while the court had jurisdiction. Thus, a concrete factual setting is missing, and petitioners are forced to rely on unsupported speculation.

Moreover, when class members are already adequately represented or have alternative means of protecting their rights, there is no reason to give them standing to appeal. Thus, the fact that intervention motions may properly be denied weighs strongly *against* granting non-party class members standing to appeal.

Petitioners also speculate—as they did in their prior petition—that requiring intervention as a prerequisite to appeal "will result in greatly protracted and burdensome class action litigation." (Pet. at 23). But as we pointed out in opposing their prior petition, petitioners' theory is spun from their false assumption that class members would have to move to inter-

vene as soon as they receive notice of the action. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), holds to the contrary. In that case, this Court held that a motion to intervene solely for purposes of appeal may be timely even if made after judgment. *Accord Marino*, 484 U.S. at 304. Petitioners do not explain why the procedure recommended by this Court would be an undue burden on litigants or the courts. Nor do they present any evidence that the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits, which have all required intervention as a prerequisite to appeal, have encountered anything resembling the parade of horribles that petitioners have conjured up.

In short, the decision below is firmly rooted in the language of the Federal Rules, the decisions of this Court, and the policies that underlie class actions. Petitioners' arguments to the contrary—which largely repeat the arguments of their unsuccessful prior petition—continue to lack merit.

IV. WHERE PETITIONERS' APPEAL FROM A JUDGMENT WAS DISMISSED FOR LACK OF STANDING AND CERTIORARI WAS DENIED, PETITIONERS MAY NOT OVERCOME THEIR LACK OF STANDING BY APPEALING FROM AN ORDER REFUSING TO VACATE THAT SAME JUDGMENT.

As described above, the Court of Appeals dismissed, for lack of standing, petitioners' appeal from the judgment approving the settlement, and this Court denied certiorari. Undaunted, petitioners now argue that they have standing to appeal from an order refusing to vacate that same judgment. Petitioners' position is untenable. If non-parties could overcome their lack of standing to appeal from a judgment simply by appealing from the denial of a motion to vacate that judgment, "[t]he rule that only parties to a lawsuit . . . may appeal an adverse judgment" would be nullified. *Marino*, 484 U.S. at 304.

The cases cited by petitioners do not support their position. To the contrary, the Court in *Kem Manufacturing Corp. v. Wilder*, 817 F.2d 1517, 1520 (11th Cir. 1987), held that "the general rule is that one must either be a party or a party's legal representative in order to have standing to bring any Rule 60(b) motion." The Court pointed out that Rule 60(b), by its very terms, provides that "a 'court may relieve *a party or his legal representative*' from a final judgment." 817 F.2d at 1519-20 (emphasis by the Court).

Kem and some other cases have recognized a narrow "potential exception" in certain circumstances where a non-party brings a motion under the savings clause at the end of Rule 60(b), which states that the Rule "does not limit the power of a court . . . to set aside a judgment for fraud upon the court." But petitioners did not bring any motion under that clause. Rather, their motion specified that it was brought pursuant to Fed. R. Civ. P. 60(b)(2), (3) and (6)[11]—and as noted above, the plain terms of the Rule provide that only "a party or a party's legal representative" may take advantage of those sections.[12]

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[11] The motion stated: "[Movants], by their counsel, hereby move the Court pursuant to Fed. R. Civ. Pro. 60(b)(2), (3) and (6) . . . ." (R. 315).

[12] A motion under Rule 60(b)(3) alleging fraud and misrepresentation is not the same as a motion under the savings clause alleging fraud on the court. As the Federal Circuit recently explained:

> "Rule 60(b) contains two references to fraud. The first is in subsection (3) . . . and the second is in the savings clause . . . [A] motion to set aside a judgment for fraud under subsection (3) must be made within one year . . . . The savings clause, in contrast, contains no time limitation.
>
> In view of the two distinct fraud provisions of Rule 60(b), '[n]ot all fraud is "fraud on the court" ' . . . Indeed, the savings clause of Rule 60(b) 'should be construed very narrowly' because 'the otherwise nebulous concept of "fraud on the court" could easily overwhelm the specific [fraud] provision of 60(b)(3) and its [one-year] time limitation.' " *Broyhill Furniture Industries, Inc. v. Craft-*

Moreover, none of the cases cited by petitioners hold that non-party class members may obtain appellate standing by making a Rule 60(b) motion and using it as a vehicle to renew an appeal that was dismissed for lack of standing. But that is precisely what petitioners are attempting to do. Their meritless allegations of "fraud" are nothing new: as petitioners admit (Pet. at 7), they asserted at the fairness hearing itself that there was "an apparent attempt by the proponents of the settlement to mislead the court and the class." The district court specifically found that the petitioners' Rule 60(b) motion reiterated accusations that the court knew about and took into account in approving the settlement. (App. at 9a-11a, 21a-23a). The Court of Appeals concluded that under these circumstances, petitioners could not use Rule 60(b) as a tool to renew their dismissed appeal: "we do not believe the special nature of the Rule 60(b) motion warrants a different conclusion as to standing in this case where the motion seeks to vacate the very settlement as to which this court earlier concluded the appellants lacked standing to challenge." (Pet. App. at 2a).

In short, after the Court of Appeals dismissed petitioners' appeal from the judgment approving the settlement and certiorari was denied, petitioners should not be permitted to renew their dismissed appeal in the guise of an appeal from the denial of a motion under Rule 60(b).

V. PETITIONERS' NUMEROUS MISFILINGS HAVE CREATED A PROCEDURAL CONTEXT WHICH MAKES THIS CASE UNSUITABLE FOR REVIEW BY THIS COURT

As we pointed out in opposition to the prior petition for certiorari, the unusual procedural posture of this case—which was created by petitioners' numerous mis-filings and is unlikely ever to be repeated—makes it unsuitable for certio-

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master Furniture Corp., 12 F.3d 1080, 1085 (Fed. Cir. 1993) (citations omitted).

rari. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10.1. As this Court has stated:

> "[T]his Court does not sit to satisfy a scholarly interest . . . . Nor does it sit for the benefit of the particular litigants. . . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955). Therefore, the issue must be of broad importance to the public, not merely to the litigants. *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1362 (1994); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Petitioners' procedural zigs and zags have created a bizarre set of facts which render the case in its present posture unworthy of this Court's discretionary review:

- Petitioners' appeal from the judgment approving the settlement was dismissed, and certiorari was denied. Having been denied standing to appeal directly from that judgment, petitioners sought to appeal from the denial of a motion to vacate that same judgment. Now, after the Court of Appeals rejected petitioners' machinations, they seek certiorari again. Thus, the procedural posture of the case is most unusual.

- Petitioners decided not to opt out *after* they studied the terms of the proposed settlement. Yet—in repetitive appeals and petitions for certiorari—they seek to overturn a settlement that they deliberately chose to join. Such circumstances, if not unprecedented, are rare indeed.[13]

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[13] Many of the decided cases, including *Guthrie*, *Croyden* and *Walker*, have concerned classes that were certified under Rule 23(b)(2) and thus did not provide class members with the opportunity to opt out. In other cases, such as *Gottlieb*, the class was certified under Rule 23(b)(3) before settlement was reached; thus, the class members did not know the settlement terms when they had to decide whether to opt out.

• Petitioners already had their own separate lawsuit (*Taylor*) pending against defendants in the Pennsylvania Court of Common Pleas, which they had been pursuing since 1986.[14] If petitioners thought that they were "well situated to obtain recoveries" in *Taylor* (Pet. at 3), they were free to opt out and pursue that case. Thus, petitioners' rights were adequately protected; they have not been deprived of any substantive right.

• The district court in this case gave petitioners the opportunity to opt out and *also* object to the settlement at the fairness hearing. Indeed, the court gave petitioners second and third opportunities to opt out *after* their objections were heard. These generous offers—far more than what was required by the Federal Rules—were rejected. Petitioners chose to remain in the class and seek to disrupt and delay the

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[14] Petitioners misstate the course of proceedings in the *Taylor* case. Petitioners waited three years after filing *Taylor* to move for class certification, and have never succeeded in obtaining certification. In 1987, the Pennsylvania Court of Common Pleas *granted* defendants' preliminary objections to the *Taylor* complaint as to all but two claims (intentional infliction of emotional distress and Magnuson-Moss Act warranty claims). Subsequently, defendants were granted summary judgment on all claims, including a claim of intentional misrepresentation, in another Pennsylvania case. *Brinkman v. Shiley, Inc.*, 732 F. Supp. 33 (M.D. Pa.), *aff'd*, 902 F.2d 1558 (3d Cir. 1989); *accord Angus v. Shiley Inc.*, 989 F.2d 142, 147 (3d Cir. 1993). Based on *Brinkman* and other developments in Pennsylvania law—which conclusively negated any cause of action—defendants then moved for summary judgment. The summary judgment motion was pending at the time the settlement below was approved. Petitioners have admitted—contrary to their assertions in the petition for certiorari (Pet. at 3)—that their claims in Pennsylvania probably would not survive summary judgment. (R. 335 at 7; R. 334, Ex. C-1).

> In the eight years since *Taylor* was filed, petitioners have not taken a single deposition. (*See* R. 225, Ex. 4). Petitioners' failure to prosecute the *Taylor* action is due to no fault of defendants: as petitioners have admitted to the Pennsylvania court, defendants' counsel has been "'cooperating' and using its 'best efforts' to facilitate plaintiffs' discovery." (R. 225, Exs. 1-3).

settlement that the class representatives and all other class members desire.

• Due to petitioners' neglect, no record has been developed as to whether a timely motion to intervene would have been granted. Petitioners did not file a motion to intervene until after they had filed a notice of appeal which divested the district court of jurisdiction. If they had filed a timely motion to intervene and intervention had been granted, the question of standing to appeal would never have arisen. If, on the other hand, a timely motion to intervene had been denied, this Court would have had the benefit of the reasons given by the district court for denying the motion. As the case stands, petitioners call upon the Court to assess the issue in a vacuum.

• After the district court regained jurisdiction and denied petitioners' untimely motion to intervene, petitioners failed to appeal from that order. Instead, they moved the district court to reconsider their intervention motion. As a result, petitioners appealed from the denial of their motion to vacate the judgment without bringing up for appeal the denial of their motion to intervene.[15]

In sum, unusual and atypical facts which result from petitioners' procedural maneuvering make this case unsuitable for certiorari review. The latest petition should be denied, as the last one was.

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[15] Petitioners assert that because the time for appeal was about to expire, they "were forced" to appeal from the order refusing to vacate the judgment notwithstanding their failure to appeal from the denial of intervention. (Pet. at 10). This is nonsense. Petitioners could have appealed the denial of their motion to intervene instead of moving for reconsideration; they could have withdrawn their motion for reconsideration and then appealed from the denial of intervention; they could have asked for an expedited ruling on their motion for reconsideration; and they could have asked for an extension of the time to appeal pursuant to Fed. R. App. P. 4(a)(5). They did none of these things.

VI. PETITIONERS' "DUE PROCESS" ARGUMENT WAS NOT RAISED BELOW, IS MERITLESS AND DOES NOT DESERVE REVIEW BY THIS COURT

Petitioners argue that the dismissal of their appeal violated their constitutional right to due process of law. However, this argument was not raised below, and it is settled that "ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *accord Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("question . . . not raised in the Court of Appeals . . . is not properly before us).[16]

Moreover, petitioners' argument is based on contested factual allegations which this Court is ill-equipped to resolve. Petitioners contend—as they did in their prior petition—that the district court treated them as "*de facto* intervenors." (Pet. at 27). Nothing of the sort took place. Petitioners were treated as objecting class members, no more. At no time did the district court indicate that petitioners were parties to the action, or that they would be treated as intervenors.

In *Marino*, this Court rejected the proposition that appearing at a fairness hearing to object to a settlement—as petitioners did—confers standing to appeal. 484 U.S. at 304. Relying on *Marino*, the Court of Appeals concluded that "merely the interest of unnamed, non-intervening class members in the outcome of the class litigation is insufficient to confer standing upon them, even if they voluntarily make their interests known, through objections, to the district court." *Shults*, 35 F.3d at 1060. One thing is certain: petitioners' assertion that they were treated as "*de facto* inter-

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[16] On page 7 of their brief in opposition to dismissal of their appeal, petitioners included rhetoric that "[d]ue process requires that Appellants not be prejudiced in this Appeal by the procedural peculiarity they had no hand in creating." Such a "vague appeal to constitutional principles does not preserve . . . due process claims." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988).

venors" does not present any serious, broadly applicable issue deserving of this Court's attention.

Petitioners assert that they had a constitutional right to rely on their understanding of two pre-*Marino* Sixth Circuit decisions,[17] which, according to petitioners, "unequivocally . . . held that intervention was *not* required to confer standing on class members to appeal a district court decision approving a settlement." (Pet. at 27). But petitioners' interpretation of those cases was *rejected* by the Sixth Circuit in *Shults*.[18] Plainly, the Sixth Circuit is best positioned to interpret its own decisions. Petitioners' misunderstanding of the law does not raise any issue of general applicability and public importance requiring this Court's review.

Petitioners next argue that their constitutional rights were violated when the Court of Appeals denied their motion to stay the appeal and remand. As the Court of Appeals observed, however, a remand would have served no useful purpose because petitioners were not parties at the time appellate standing is determined—when they filed their notice of appeal. (Pet. App. at 2a).

Petitioners' constitutional argument suffers from another infirmity as well. Petitioners state that *when there is a right to appeal*, that right may not arbitrarily be denied. However,

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17 *See Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972).

18 *Shults* explained that appellate standing under *Cohen* exists only where "the putative appellant . . . [is] haled into court 'like a defendant who is summoned by process of court' "—a condition that is *not* satisfied by a notice advising class members that they may object to a proposed settlement at a fairness hearing. 35 F.3d at 1060-61. The *Shults* Court went on to explain that appellate standing under *Sertic* exists only when there is an appeal from a denial of a motion to intervene and the Court finds that intervention should have been granted, 35 F.3d at 1060, conditions that are not present here.

there is no right to appeal when an appellant lacks standing to appeal.[19] Petitioners' argument, therefore, is inapposite.

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Dated: New York, New York
December 7, 1994

Respectfully submitted,

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[19] Contrary to petitioners' assertion (Pet. at 28), 28 U.S.C. § 1291 simply grants appellate jurisdiction to the Courts of Appeals. It does not do away with settled principles of appellate standing.

APPENDIX

PERTINENT PROVISIONS OF THE RULES INVOLVED

Rule 23 of the Federal Rules of Civil Procedure in pertinent part provides:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
>
> **(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**
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> * * *
>
> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circum-

> stances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.
>
> * * *
>
> **(d) Orders in Conduct Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members . . . of the opportunity of members . . . to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors . . . .
>
> **(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24 of the Federal Rules of Civil Procedure in pertinent part provides:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the

applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 60(b) of the Federal Rules of Civil Procedure in pertinent part provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of a judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court.

Rule 3 of the Federal Rules of Appellate Procedure in pertinent part provides:

(c) Content of the Notice of Appeal. A notice of appeal must specify the party or parties taking the appeal by

naming each appellant in either the caption or the body of the notice of appeal. . . . In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-91-256

ARTHUR RAY BOWLING, *et al.*,

Plaintiffs,

—VS.—

PFIZER, INC., *et al.*,

Defendants.

ORDER

This matter is before the Court on the following pleadings: the Objections of Sidkoff, Pincus & Green (the "Green firm") (doc. 315), the Defendants' Initial Response (doc. 318), the Plaintiffs' Initial Response (doc. 319), the Green firm's Motion to Supplement (doc. 320), the Motion by Special Counsel John T. Johnson to extend time (doc. 324), the Plaintiffs' Response (doc. 325), the non-opposition Plaintiffs' Response (doc. 326), the Defendants' Response (doc. 327), the Defendants' Addendum (doc. 328), the Defendants' Motion to Supplement (doc. 329), the Plaintiffs' Notice of Filing Original Affidavit of John T. Johnson (doc. 330), the Defendants' Memorandum in Opposition to non-opposition Plaintiffs (doc. 331), the Green firm's Response to John T. Johnson's Motion to Extend Time (doc. 332), the Green Firm's Reply (doc. 333), and the Notice of Filing (doc. 334).

PRELIMINARY MATTERS

Before dealing with the guts of the issues before this Court, we must first tend to some housekeeping matters. Because the Green firm has a brief due in the Sixth Circuit, this Court agreed to give this matter expedited consideration. Consequently, we requested the Plaintiffs and the Defendants to respond regarding this Court's jurisdiction to consider this matter. After examining the arguments of all parties, we required the Plaintiffs and the Defendants to respond to the merits of the Green firm's Motion by March 15, 1993. The Defendants then asked if they could have until March 16, 1993 to respond. As the Green firm had no objections, we acceded to the Defendants' request.

The Defendants filed the substance of their Response on March 16, 1993. The Defendants, however, have asked to supplement their Response. Because we already granted the Defendants an extension of time, their Motion to Supplement is denied (doc. 329). Similarly, Special Counsel John T. Johnson's Motion for an extension of time is denied (doc. 324). Mr. Johnson was informed of this decision by phone in order to allow him to file his materials, which he did through affidavit.[1] Finally, the Green firm's Motion to Supplement to include Exhibit F is granted, as the Defendants and the Plaintiffs have had the opportunity to examine Exhibit F before filing their respective Responses.

BACKGROUND

The parties to this class action settled this litigation. Under Fed. R. Civ. P. 23(e), this Court held a fairness hearing over the course of several days. On August 19, 1992, this Court issued an Order finding the settlement between the parties to be fair, adequate, and reasonable. *Bowling v. Pfizer*, 143

[1] In the future, the Court asks that, if possible, special counsel work with lead counsel in filing one set of pleadings with the Court.

F.R.D. 141 (S.D. Ohio 1992) (doc. 250). Because objectors to the settlement filed two appeals with the United States Court of Appeals for the Sixth Circuit, this Court stated on November 9, 1992 that because of doubts over its jurisdiction, this Court would not decide any of the pending motions in the case until the Court clearly possessed jurisdiction. *See* doc. 297. Since then, the Court has tended only to a few administrative aspects of this case. *See e.g.*, doc. 315 (approving of payment to Special Master); doc. 323 (authorizing the Special Master to disburse funds to the Internal Revenue Service, as required under the law).

DISCUSSION

The Green firm has asked this Court to reopen this case. *See* Fed. R. Civ. P. 60(b). Before we consider the merits of this motion, we must determine whether this Court has jurisdiction to act. This Court's jurisdiction is in doubt because the Green firm has filed two appeals in the Sixth Circuit.

Jurisdiction

Ordinarily, a trial court loses jurisdiction of a case once a party files a notice of appeal. *First Nat'l Bank v. Hirsch*, 535 F.2d 343, 345 n.1 (6th Cir. 1976). However, when a party seeks to reopen a case under Fed. R. Civ. P. 60, a district court does retain some power. The extent of the district court's power in this Circuit is ambiguous. Some cases hold that the district court can formally deny a Rule 60(b) motion. *See e.g.*, *Schewchun v. Edwards*, 815 F.2d 79 (6th Cir. 1987) (published in WESTLAW) ("[t]he district court, however, can *consider* a Rule 60(b) motion despite the filing of a notice of appeal") (emphasis added). Other cases have held that a district court may examine the merits of the motion and indicate to the Court of Appeals whether the district court wishes to have jurisdiction over the case again. *See e.g.*, *Smith v. Com-*

bustion Engineering, Inc., 843 F.2d 1392 (6th Cir. 1988) (published in WESTLAW) (dismissed an appeal from a denial of a Rule 60(b) motion because the district court did not have jurisdiction to deny a Rule 60(b) motion). Under either approach, if a district court indicates that it wishes to consider fully the Rule 60 motion, the court of appeals generally will remand the case to the district court before considering the appeal. *Hirsch*, 535 F.2d at 343; *see also Flynt v. Brownfield, Bowen & Bally*, 726 F. Supp. 1106, 1108-09 (S.D. Ohio 1989).[2]

Because this Court does not wish to risk infringing upon the jurisdiction of our parent court, we will not actually rule upon the Green firm's Rule 60(b) motion. Instead, this Court will indicate in this Order whether we wish the Court of Appeals to remand the case back to this Court.

Standard

The Federal Rules allow a court to reopen a case following a Final Judgment in the case under certain limited reasons, including: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that which could not

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[2] The Green firm contends that "this Court can consider the substantive matters Defendants intend to raise only after the case shall have been remanded by the Sixth Circuit." Objectors' Reply, doc. 321, at 2. While this Court may not be able to rule upon the Green firm's Rule 60(b) motion, we do have the authority and obligation to indicate to the Court of Appeals whether this Court is inclined to grant the Green firm's motion. For this Court to make a rational decision, we must examine the merits of the Rule 60(b) motion.

The Green firm contends that this Court should automatically ask the Sixth Circuit to remand the case because a Rule 60(b) motion has been filed. The Green firm reasons that only with a remand can this Court examine the merits of their Motion. We do not think this Court should adopt such a rigid, *per se* rule. If this Court did automatically request a remand upon the filing of a Rule 60(b) motion, then a litigant purposefully could delay an appeal by filing a Rule 60(b) motion(s).

reasonably have been discovered; (3) fraud, misrepresentation, or other misconduct; (4) a void judgment; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief from the operation of the judgment. Fed. R. Civ. P. 60(b).

To prevail on a Rule 60(b) motion, "[t]he moving party has an extremely difficult burden to overcome." *Wilson v. Upjohn Co.*, 808 F. Supp. 1321, 1323 (S.D. Ohio 1992) (Spiegel, J.). Rule 60(b) motions may be granted only in extraordinary situations and must be weighed against the public interest in protecting the finality of judgments. *See e.g., Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986); *Fertilizer Corp. of India v. IDI Management, Inc.*, 530 F. Supp. 542, 545 (S.D. Ohio 1982) (Spiegel, J.). We must also take into consideration the immediate needs of thousands of class members for some form of relief while this litigation festers.

Newly Discovered Evidence

Because this Court is not going to grant or deny the Green firm's Rule 60(b) Motion in this Order, we are not going to discuss at length every point in the Green firm's Motion. Instead, we will save a more thorough discussion of the Green firm's Motion until this Court possesses jurisdiction to actually rule upon their Motion.

This Court has examined the Green firm's motion. After reading and considering their arguments, we ask that the Sixth Circuit retain jurisdiction of this case. We base this request upon a number of factors.

1. Some of the matters raised by the Green firm were already considered by this Court. For instance, this Court has ruled that discovery of the negotiations behind this settlement are inappropriate unless there is some evidence of collusion. Furthermore, the Green firm makes another argument concerning the law. As pointed out before, only one court, *Khan*

v. Shiley, Inc., 217 Cal. App. 3d 848, 266 Cal. Rptr. 106 (1990), has allowed an implantee with a fully functioning heart valve past the summary judgment stage. Dozens of other courts have rejected claims involving fully functioning heart valves. In fact, Mr. Green, himself, has conceded that his clients' claims in Pennsylvania probably would not survive summary judgment. *Taylor v. Shiley*, Transcript of Hearing, Dec. 29, 1992, at 51-2.[3]

2. Many of the "newly discovered" matters discussed by the Green firm were actually known by the Green firm, or with reasonable diligence could have been discovered at the time of the fairness hearing. For example, the Green firm points to the alleged evidence of Pfizer's fraud discovered by John T. Johnson. In his affidavit, Mr. Johnson states "I have had numerous discussions with Mr. Green, some going back to 1988, in which I explained to him all of Pfizer's and Shiley's fraudulent schemes . . . ." Doc. 330, at 2, at ¶ 5.

3. In approving the settlement of this class action, this Court found the settlement, as a whole, to be fair, adequate, and reasonable. We realized that Pfizer had some weaknesses in their case. Otherwise, we doubt that Pfizer would have settled—especially not for the amount of money involved in this settlement. When this Court held its fairness hearing, this Court was well aware that some Plaintiffs' counsel had accused the Defendants of fraud. We took the evidence supporting this accusation into account when we approved the parties' settlement.

4. The Green firm devotes considerable attention to the study funded by Pfizer conducted at the Beaumont Hospital in Michigan. We first noted that, fortunately, research is ongoing with regard to the Bjork-Shiley convexo/concave heart valve. Research results subsequent to this Court's approval of the settlement are not relevant. If this Court were to consider

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[3] This Court noted with great interest Mr. Green's characterization before Judge Lord of the settlement and the fairness hearing in this case.

such research, then we would discourage companies from conducting potentially beneficial research after settling litigation. With regard to research conducted before the settlement, it appears that Pfizer and class counsel revealed this research in pleadings with the Court and at the fairness hearing. *See e.g.*, Affidavit of Dr. Roger Sachs, attached as Exh. A to doc. 327; Letter from David A. Klingsberg to Kenneth Kasdan, attached as Exh. B to doc. 327.

5. The Green firm also points out that class members who opted out of the settlement may be in a better position to litigate or receive more favorable settlement terms now than they were when this Court approved the settlement. We do not believe this is of relevance. At the time of the fairness hearing, the mission of this Court was to determine if the settlement was fair, adequate, and reasonable at the time. We found that it was. If the Green firm's argument is taken to its logical extreme, then the Defendants could likewise argue that the Judgment should be reopened based upon favorable developments in the law. That, however, is not how settlements work. Settlements allow parties to pay a certain sum to avoid the risk of paying a potentially larger sum as a result of trial.

6. The Green firm maintains in their Reply brief that the proponents of the settlement may have mentioned certain facts, but that the proponents did not fully explain the ramifications of those facts. With reasonable diligence, the Green firm could have ferreted out these facts, especially in light of the fact that the Green firm has been pursuing heart valve litigation against Pfizer for many years.

7. Much of the "newly discovered evidence" noted by the Green firm consists of newspaper articles. However, this Court has been reluctant to use newspaper articles as evidence to support a Rule 60(b) motion. *See Wilson v. Upjohn Co.*, 808 F. Supp. 1321, 1323 n.2 (S.D. Ohio 1992) (Spiegel, J.).

8. During the fairness hearing and in writing up our Order this Court attempted to scrutinize the proposed settlement.

Based upon the Green firm's arguments, we doubt that the public policy favoring the finality of judgments should be upset in this case, after this Court's careful consideration of the parties' settlement.

CONCLUSION

We have not ruled upon the Green firm's Rule 60(b) Motion. However, after examining the grounds for their motion, we ask that the United States Court of Appeals for the Sixth Circuit retain jurisdiction of this case in order to decide the pending appeals.

SO ORDERED.

Dated: 3/26/93

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-91-256

ARTHUR RAY BOWLING, *et al.*,

Plaintiffs,

—vs.—

PFIZER, INC., *et al.*,

Defendants.

ORDER LIFTING STAY DENYING MOTIONS TO INTERVENE AND AUTHORIZING DISTRIBUTION OF FUNDS

This matter is before the Court on:

I. the Motion by the Pennsylvania Class Objectors for an Order to Alter or Amend Order Dated April 14, 1994 (doc. 371), the Plaintiff Class's Response (doc. 378), the Defendants' Response (doc. 380), and the Motion of the Pennsylvania Class Objectors for Ruling on Pending Motion (417), to which the Plaintiff Class (doc. 422), as well as the Defendants (doc. 423) have responded;

II. the Motion by Class Members Gary Crane *et al.* to Intervene (doc. 373), the Plaintiff Class's Response (doc. 373) and the Defendants' Response (doc. 384); and the Motion of Class Members Gary Crane *et al.* for Discovery and Briefing Schedule on Attorney's Fees (376).

III. In addition the Special Masters/Trustees have submitted the Notice of Mailing to Class Members and for Publication (doc. 397).

I. PENNSYLVANIA CLASS OBJECTORS' MOTIONS TO INTERVENE

Previously, the Pennsylvania Class Objectors ("PCO") have filed a Motion to Intervene (doc. 265), which we denied by our Order of April 5, 1994 (doc. 363). The PCO also filed a Motion to Reconsider (doc. 315), which we denied by Order of April 12, 1994 (doc. 368). In addition the PCO has taken numerous appeals to the Sixth Circuit, all of which have been dismissed. Finally, the United States Supreme Court has denied *certiorari* to the PCO.

Certiorari has been denied, all appeals have been exhausted and the judgment of this Court approving the settlement is final. The parties in co-operation with the Special Masters/ Trustees are moving toward the implementation of the settlement and the class members will soon begin to enjoy the benefits of their lawsuit. The PCO has delayed the implementation of the settlement for over two years with their series of appeals. The PCO now has moved this Court to amend our Order of April 5, 1994, in which we denied the PCO's Motion to Intervene. In the alternative, the PCO request that we grant their renewed Motion to Intervene and/or grant relief from judgment under Rule 60(b) or to grant permission for the filing of an amended 60(b) motion. The admitted aim of the PCO's motions is to be allowed to intervene in order to file another round of appeals, which would again significantly delay the implementation of the settlement. The PCO has had an opportunity to make their objections to the settlement and those objections have been carefully considered. it is time now for the implementation of the settlement for the benefit of the Plaintiffs' Class. The tens of thousands of class members who are waiting for the set-

tlement's benefits have waited long enough. Furthermore, our understanding of the Sixth Circuit's rulings in the PCO's previous appeals indicates that even if we allowed the PCO to intervene at this point, their opportunity for appeal has long past.

A. *TIMELINESS OF THE PCO'S MOTIONS*

"An application for permissive or intervention of right must be timely." *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981). If untimely, intervention must be denied. *Id.* Timeliness in a matter within the sound discretion of the district court. *Id.* The Sixth Circuit has articulated the factors "which are particularly probative in determining whether intervention is timely." *Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 582 (6th Cir. 1982). Those factors are:

> 1) the purpose for which intervention is sought; 2) the length of time preceding the application for intervention during which the proposed intervenor knew or reasonably should have known of his interest in the case; 3) the prejudice to the original parties due to the proposed intervenor's failure after he knew of or reasonably should have known of his interest in the case to apply promptly for intervention; 4) the existence of unusual circumstances militating against or in favor of intervention; and 5) the point to which the suit has progressed.

Id. (citing *Retarded Citizens*, 657 F.2d at 105). We will examine these in order.

1. *The Purpose for Intervention*

The PCO's stated purpose in seeking intervention is to pursue a course of further appeals, aimed at overturning this Court's approval of the settlement in this case. The PCO in their Motion for the Court to Rule on Pending Motion have

made an impassioned plea that justice requires that their objections to class certification and to the settlement be revisited. They argue further that unless we grant their motion to intervene they will be deprived of their opportunity to be heard. However, the record of this case indicates that this Court has afforded the PCO ample opportunity to be heard and has in turn carefully considered and responded to each objection they have raised.

The PCO has had the opportunity to raise their arguments before this Court in numerous documents. In addition, Mr. Green spoke at length at the fairness hearing. In our Order Finding the Proposed Settlement to be Fair, we devoted forty pages to objections raised by the PCO. Document 250 at 18-58, August 19, 1992. Finally, we note that the Plaintiffs' Class, in their Memorandum in Opposition to the PCO's motion to amend cites us to the record in the PCO's original case in Pennsylvania in which counsel for the PCO applauded the *Bowling* settlement, explaining why the PCO had not opted out of this case, as they were entitled to under the settlement. The Plaintiffs' Class reports that counsel for the PCO told Judge Lord:

> [A]lthough our clients were offered the opportunity to opt [out] of the *Bowling* case, they elected to stay in the case and obtain the benefits from the Bowling settlement . . . . One of our clients has been identified as a candidate for a re-operation which means that her Pfizer heart valve would be removed and a new heart valve implanted. Under the *Bowling* settlement, this client could expect to receive substantial compensation and to thus be able to afford the procedure. Accordingly, the prospect of waiting many, many years for a resolution of the *Taylor* case, compared to the relief provided by a prompt implementation of the *Bowling* settlement was something that the client considered. The other client who has a working valve is also in a fragile state of health.

Memorandum of Plaintiffs' Class at 4, n.4, Document 422, (citing a hearing in *Taylor v. Shiley* held on December 29, 1992).

The PCO's stated purpose in seeking to intervene is to attack the fairness of the settlement. But the PCO has had ample opportunity to do this before this Court. The Sixth Circuit has clearly delineated our responsibility in this situation in the *Stotts* case. There the Court of Appeals was reviewing a situation very similar to that now before us, where individuals sought to intervene to object to a consent decree that the district court had already approved:

> [T]he court afforded the proposed intervenors *an opportunity to air their objections* to the 1980 Decree. This is all that the court was required to do given its determination that the 1980 Decree was reasonable.

Stotts, 679 F.2d at 584 (emphasis added). This Court has given the PCO ample opportunity to "air their objections," and has considered and responded to each.

2. *The Delay in Moving for Intervention*

The PCO argues that they moved to intervene as soon as they realized that their failure to intervene would present a problem in their attempts to appeal the judgment of this Court. Essentially, the PCO's complaint is with the Court of Appeals. At the level of this district court, the PCO has been given every opportunity to present their case, even at this late date. Therefore, we are not inclined to grant this motion to intervene over two years after our approval of the settlement in order to provide the PCO with an opportunity to further delay its implementation.

3. *Prejudice to the Parties*

The third factor to be considered in determining whether a motion to intervene is timely is "the prejudice to the original parties due to the proposed intervenor's failure after he knew of or reasonably should have known of his interest in the case

to apply promptly for intervention." *Stotts*, 679 F.2d at 582. By far the most compelling reason to deny the PCO the opportunity to intervene is to immediately begin the implementation of the settlement. The Parties have the right to the compensation provided under the settlement. The research provided for should begin at once. Below, we authorize the first distribution from the Consultation Fund. The Special Masters/ Trustees intend to disburse these funds in the next month. To postpone the benefits of the settlement for another round of appeals would indeed be prejudicial to the members of the class.

In our Order of April 5, 1994, which the PCO now request that we alter, we denied the PCO's motion to Intervene

> because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class . . . .

Order at 1, Document 363. The reasoning that we applied in that order becomes more urgent with every passing day.

4. *Unusual Circumstances*

The fourth factor for timeliness provided by the Sixth Circuit is "the existence of unusual circumstances militating against or in favor of intervention." *Stotts*, 679 F.2d at 582. One of the most creative aspects of this settlement is the open ended nature of the Defendants' liability. For example the Defendants will remain liable for all fractures, regardless of the number. Another example is the continuing duty to replenish the Patient Benefit Fund to insure permanent availability of replacement surgeries. Finally, in several circumstances, the settlement offers Plaintiffs the opportunity to bring separate suit if he or she is not satisfied with the benefits provided under the settlement.

Besides the unusual flexibility of the settlement itself, this Court retains continuing jurisdiction over the operation of the settlement. The Court has appointed able and conscientious Special Masters/Trustees who also keep a watchful eye on the fairness of the settlement's implementation, and who regularly report to the Court. In addition the Special Masters/Trustees have assembled a Supervisory Panel composed of some of the most respected physicians in the field and a Foreign Fracture Panel of comparable expertise. Therefore, even if some of the PCO's wildly speculative predictions of problems with implementation of the settlement should surface, we are confident that the Court, in its continuing control, with the help and guidance of the competent professionals now assembled is prepared to address them.

5. *The Point to Which the Suit Has Progressed*

After considering timeliness in terms of the previous four factors the Sixth Circuit's directs us to consider "the point at which the suit has progressed." *Michigan Ass'n for Retarded Citizens*, 657 F.2d at 105. It is now over three years since the beginning of this litigation. The PCO first appeared in this case nearly two and one half years ago. The settlement has been approved for over two years. Notice has been sent to the class members. Objections and opt-outs have been completed. The Supervisory and Foreign Fracture Panels have bene appointed and have been working for months. The first distribution from the Supervisory fund is only weeks away. The interest of justice would not be served by intervention at this time.

B. *LEGAL INFIRMITIES IN PCO'S ARGUMENTS*

1. *Objecting and Appearing Does Not Make the PCO a Party*

The PCO argues that intervention would merely formalize its status as an intervenor, because they appeared and objected

at the fairness hearing. The Green firm argued to the Court of Appeals:

> [F]or all purposes, the court below treated appellants as parties in this case. Appellants . . . vigorously participated extensively in the Fairness Hearings themselves. . . . The doctrine of *de facto* intervention is clearly applicable to appellants . . . .

Appellants' Response to Appellees'-Defendants' Motion to Dismiss Appeal at 29. However, the Sixth Circuit rejected that argument, stating that "[b]ecause the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." *Bowling v. Pfizer, Inc.*, No. 92-3973 slip op. at 1 (6th Cir. Dec. 21, 1993), (citing *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987); *Croyden Associates, v. Alleco, Inc.*, 969 F.2d 675, 568-79 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 10071, 1073-75 (5th Cir. 1988)). The PCO argued unsuccessfully to the Sixth Circuit that because this Court allowed the PCO to participate to the fullest extent possible, the PCO should be considered parties for the purposes of appeal. Ironically, now the PCO returns to this Court charging that their participation in the fairness hearing was inadequate.

2. *Intervention Will Not Accomplish the PCO's Goals*

The PCO seeks to intervene so that it can once again attempt to appeal from our approval of the settlement. But as the Defendants point out, intervention will not give the PCO the right to appeal. The time for appeal of that judgment has now passed. *See Jenkins v. State of Missouri*, 967 F.2d 1245, 1248 (8th Cir.) (where the district court granted the motion to intervene, and the court of appeals held that "granting the group intervenor status cannot breathe life into rights already foregone"). The PCO argues without authority that we can grant them intervenor status which relates back to the time which they filed their first appeal. Even if we were inclined

to so rule, it is extremely hopeful speculation on the part of the PCO that the court of appeals would allow them to revive their appeal. The Sixth Circuit's own language in one of the PCO's prior appeals would seem to rule out the effectiveness of "retroactive" intervention:

> The lack of intervenor status *at the time of the appeal* suggests that the appellants were not "parties" when they brought the notice of appeal.

Bowling v. Pfizer, Inc., No. 94-3519 (6th Cir. August 8, 1994) (citing Fed. R. App. P. 3(c); *Jenkins v. Missouri*, 967 F.2d 1245 (8th Cir.) *cert. denied*, 113 S. Ct. 811 (1992)).

C. *THE PCO'S OTHER ARGUMENTS*

Although we believe that the reasoning set forth above is determinative of the PCO's motion now before us, we feel compelled to address briefly some of the more inflammatory accusations which the PCO makes in the Motion of the PA Class Objectors for Expedited Consideration and Raising Matters Under Fed. R. Civ. Pro. 60(b)(2)(3) and (6) (doc. 315). The PCO declares that we should amend our judgment in light of new evidence, discovered after our ruling that the settlement is fair. The PCO claims that their "new evidence" proves that a fraud was perpetrated on this Court by the misrepresentations of class counsel and counsel for the Defendants. In fact, we have heard many of these arguments before from the PCO, others are based on the PCO continued misunderstanding of the details of the settlement, and some are based on "new evidence" which in fact was brought forward by the parties and considered by the Court in the process of approving the settlement.

Running throughout the PCO arguments is the theme that Class Counsel and the Defendants colluded to fashion a settlement which was favorable to the Defendants. This objection was considered at length in our August 19, 1992 order

approving the settlement. In that order, we studied the PCO's allegations carefully and discovered that the PCO provided no real evidence to support these allegations. However, admitting that proof of collusion was difficult, we focused on the settlement itself to discover if it in fact was fair. In doing so we followed the guidance of the United States Court of Appeals for the Fifth Circuit, which has stated:

> It is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable, and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

In re Corrugated Antitrust Litigation, 643 F.2d 195, 212 (5th Cir.) *cert. denied*, 456 U.S. 998 (1982). Having examined the settlement and found it fair, we find no basis for the PCO's bold allegations of collusion and fraud on the Court, particularly in the absence of any real evidence presented by the PCO.

One of the PCO's specific arguments is that the Court in approving the settlement failed to consider the strength of the class's fraud claims. Principally, this claim is based on the opinion of Professor Oscar Gray that the Plaintiffs' Class's fraud claim was stronger than was represented to the Court. In addition, the PCO claims that Class Counsel John T. Johnson and others withheld information concerning the Defendants' alleged fraud. However, the Court was well aware of Class Counsel Johnson's discoveries. The relative strength of the Plaintiffs' Class's fraud claim was considered at length by the Court. We acknowledge that the issue is far from certain, and is an appropriate subject for legal argument. However, we are satisfied that the relative strengths and weaknesses of the

Plaintiffs' Class's fraud claims were weighed by the parties in reaching the settlement, and by the Court in approving it.

Another major accusation of the PCO is that the Court was deceived concerning the Defendants' prior medical research and in particular the Beaumont study. Here the PCO relies on articles appearing in the *New York Times* in the fall of 1992, shortly after the settlement was approved. Those articles, as characterized by the PCO, claim that the Defendants had perfected a method for detecting defective valves, using sophisticated X-ray techniques. The articles claim that the screening process would be quite costly and the PCO argues that they are significantly more expensive than is provided for in the settlement.

By the PCO's own admission "the Court, *sui sponte*, raised the issue of the stories relating to Beaumont that had appeared in *The New York Times* and the *Wall Street Journal*. . . ." Motion of the PCO at 34, Document 315. The Court was satisfied by the response of the parties concerning the Beaumont studies. Counsel for the Class indicated that the Beaumont study was part of the Defendants' ongoing research toward identifying defective valves, that the techniques developed there did not yet constitute a practical technique for detecting defective valves, and that that research would be handed over to the independent Supervisory Panel, one of whose duties is to direct research under the settlement. Having met with the now empaneled Supervisory Panel, the Court is satisfied that this independent group of top-flight medical experts will examine the Beaumont research and make the appropriate reports to the Court.

We further note that many decisions remain for this Court, the Special Masters/Trustees and the expert panels, before the settlement can be fully implemented. Significant among them are the nature and amount of diagnostic testing which will be provided. This in turn is dependent upon the research and recommendations of the Supervisory Panel. Such basic issues as

what constitutes a fracture and who should be eligible for replacement surgery are yet to be decided. The Court is most anxious to embark upon this stage of the case and to begin to see the settlement actually benefit the class members. For this very practical reason, in addition to the legal requirements discussed above, the Court must deny the PCO's motions.

II. GARY CRANE *ET AL.'S* MOTIONS

Class members Gary Crane, Gene Randall, and *amicus curiae* Public Citizen have moved for a discovery and briefing schedule on attorney's fees. Previously, we have stayed all matters concerning attorney's fees pending the decision of the United Stats Supreme Court in regard to *certiorari*. Since the Supreme Court has now declined to grant *certiorari*, we hereby lift that stay. Parties may conduct discovery in regard to attorney's fees until June 1, 1995. All motions in regard to attorney's fees must be filed with the Court by July 15, 1995.

Class members Gary Crane, Gene Randall, and Gerard Benadik have also moved to intervene. These class members seek to intervene in respect to "the attorney's fees issue," and "any other post-settlement matter upon which there might be an appealable issue." At the same time these movants admit that they "have no outstanding objections to the settlement other than the fees issues."

We have already given the movants' counsel, who appeared as *amicus curiae* at the fairness hearings, the right to appear with respect to attorney's fees. They are entitled to participate in the briefing of the attorney's fees issue and to make appearances at any hearings the Court may conduct in regard to such matters. However, for the same reason stated above in regard to the Pennsylvania Class Objectors, we decline to grant their Motion to Intervene.

III. INITIAL DISTRIBUTION OF CONSULTATION FUND

The Special Masters/Trustees have submitted for approval a Notice for Mailing to Class Members and for Publication. We hereby approve that notice. The Special Masters/ Trustees have proposed that the first of two distributions from the Consultation Fund be made in December, 1994. We hereby approve that first distribution. In making that distribution, we order the Special Masters/Trustees to hold in reserve at least twenty-five percent (25%) of the Consultation Fund for the purposes of future payment of attorney's fees and expenses. We do this out of an abundance of caution. This percentage does not represents the Court's future intentions in regard to attorney's fees. That decision will be made at a later date after the Court has had the opportunity to review the briefs on the subject of attorney's fees, the filing of which we have authorized above. Furthermore, the fact that we are reserving this amount from the Consultation Fund does not represent a decision to preclude the use of monies from the other funds for the purpose of attorney's fees.

CONCLUSION

Accordingly, for good cause shown and in the interest of justice, the Motion by the Pennsylvania Class Objectors for an Order to Alter or Amend Order Dated April 14, 1994 (doc. 371) is DENIED. The Motion by Class Members Gary Crane *et al.* to Intervene (doc. 373) is likewise DENIED. The Motion of Class Members Gary Crane *et al.* for Discovery and Briefing Schedule on Attorney's Fees (376) is GRANTED as described above. Finally, the Special Masters/Trustees' Notice of Mailing to Class Members and for Publication (doc. 397) is APPROVED and the Special Masters/Trustees' request to partially distribute monies from the Consultation Fund is APPROVED with the limitations set forth above.

SO ORDERED.

Dated: Nov. 23, 1994

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

Supreme Court, U.S.
FILED
DEC 8 1994
OFFICE OF THE CLERK

No. 94-843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

—v.—

PFIZER INC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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20 pp

QUESTION PRESENTED

Whether petitioners, as unnamed, nonintervening class members, have standing to appeal a district court's order denying their Fed.R.Civ.P. 60(b) motion to reconsider approval of a class settlement, when through previous appeal a final determination has been made that the unnamed, nonintervening class members lacked standing to appeal from the underlying judgment approving the class settlement.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

ADDITIONAL OPINION BELOW 2

STATEMENT OF THE CASE..... 2

SUMMARY OF REASONS FOR DENYING THE WRIT 8

REASONS FOR DENYING THE WRIT..... 9

I. The Court Of Appeals For The Sixth Circuit Applied Established Principles Of Appellate Procedure Established By This Court And Consistently Applied By The Courts Of Appeal..... 9

II. The Unique And Unusual Facts Of This Case Make It Unsuitable For Review By This Court... 12

III. Petitioners' "Due Process" Argument Is Meritless 13

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases: PAGE

Angus v. Shiley. Inc., 989 F.2d 142 (3rd Cir. 1993).... 3

Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3rd Cir. 1993) 10

Bender v. Williamsport Area School Dist., 106 S.Ct. 1326 (1986) 12

Bowling v. Pfizer, 143 F.R.D. 141 .....2, 3, 4, 5

Brinkman v. Shiley, Inc., 732 F.Supp. 33 (M.D.Pa. 1989), *aff'd*, 902 F.2d 1558 (3rd Cir. 1989)..... 3

Broyhill Furniture v. Craftmaster Furniture, 12 F.3d 1080 (Fed.Cir. 1993) 12

Carlough v. Amchem Products, Inc., 5 F.3d 707 (3rd Cir. 1993) 10

Cohen v. Young, 127 F.2d 721 (6th Cir. 1942)..... 6, 13

Croyden Associates v. Alleco, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1251 (1993).....6, 9, 11

Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993) 9, 10

Guthrie v. Evans, 815 F.2d 626, 627-28 (11th Cir. 1987) 6

In re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) 11

In re Four Season Securities Laws Litigation, 502 F.2d 834 (10th Cir. 1974) 12

PAGE

In re Lovitt, 757 F.2d 1035 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 145 (1985) 12

In re VMS Limited Partnership Securities Litigation, 976 F.2d 362 (7th Cir. 1992)..... 10

Loran v. Furr's/Bishop, Inc., 988 F.2d 554 (5th Cir. 1993) 9

Marino v. Ortiz, 484 U.S. 301 (1988) 8, 9, 10, 11, 13

Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977) 11

Ridgeway v. Pfizer, Inc., 115 S.Ct. 294 (1994) 1, 7, 8

Sertic v. Cuyahoga Lake, Geauga and Ashtabula Counties Carpenters District Council, 459 F.2d 579 (6th Cir. 1972)..... 13

Shores v. Sklar, 844 F.2d 1485 (11th Cir. 1988) 9

Shults v. Champion International Corp., 35 F.3d 1056 (6th Cir. 1994) 9, 13

Taylor v. Shiley, Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division (Philadelphia) February Term, 1986, No. 2087 .....2, 3, 5, 8, 12

United Airlines Inc. v. McDonald, 432 U.S. 385 (1977) 9

Walker v. City of Mesquite, 858 F.2d 1071 (5th Cir. 1988) 6, 9

Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) 11

PAGE

Statutes and Rules:

28 U.S.C. § 1291 ..... 9, 13

Fed.R.App.P. 3(c) 11

Fed.R.Civ.P. 23 11

Fed.R.Civ.P. 23(b)(3) 11

Fed.R.Civ.P. 60(b) 5, 8, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-843

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

—v.—

PFIZER INC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondents, Plaintiffs' Class Bowling, et al., oppose the Petition for a Writ of Certiorari.[1]

The Petition raises issues identical to those raised in petitioner's previous petition for certiorari in this case (No. 93-1912), which petition was denied by this Court on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S.Ct. 294 (1994). Further, the Court of Appeals for the Sixth Circuit has dismissed petitioners' appeal upon the basis of established principles of appellate standing as set forth by this Court, and applied by the Courts of Appeals. Additionally, the facts of the instant

[1] Respondents have no Rule 29.1 parent companies or subsidiaries.

case are so particular to this matter that this case is not suitable for review by the Supreme Court

ADDITIONAL OPINION BELOW

The decision of the district court approving the class settlement is reported at 143 F.R.D. 141 (S.D.Ohio 1992).

STATEMENT OF THE CASE

Bowling, et al. v. Pfizer Inc, et al., the litigation from which the instant petition arises, is a product liability class action which was brought on April 19, 1991 by living recipients implanted with the Bjork-Shiley Convexo/Concave Heart Valve and their spouses. The Convexo/Concave Heart Valve was manufactured by defendant Shiley Incorporated, a wholly-owned subsidiary of defendant Pfizer Inc. Plaintiffs' class alleges that the Convexo/Concave Heart Valve is inherently defective in that the product has a propensity to fracture. Plaintiffs' class includes approximately fifty thousand (50,000) valve recipients residing world-wide.

Petitioners are neither named parties nor intervenors to the *Bowling* litigation, but merely two valve recipients and one spouse who are class members. Petitioners filed a state court class action, *Taylor v. Shiley*, in February 1986, on behalf of Convexo/Concave Heart Valve recipients residing in Pennsylvania, only, with large (but not small) valves, who did not have pending lawsuits. (R. 143, Ex. D: Second Amended Complaint In *Taylor v. Shiley*, at p. 34).[2] In September, 1989, more than three years after initial filing of their Pennsylvania lawsuit, plaintiffs first moved for class certification. Their motion for certification has been pending before the state court for more than five years. No class has been certified in the state court action. Neither have class counsel been

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[2] Citations to the record are to the district court docket numbers.

appointed in the action, nor has any communication with members of that putative class ever been undertaken or ordered by the state court. No class settlement has been negotiated in *Taylor v. Shiley*. Petitioners allege that they were well situated to obtain a sizable recovery upon the behalf of the putative Pennsylvania class. This allegation is false and was determined to be "specious" by the district court. *Bowling v. Pfizer*, 143 F.R.D. 141, 161 (S.D.Ohio 1992). Precedential case law negates the viability of any cause of action by petitioners under Pennsylvania law. *Brinkman v. Shiley Inc.*, 732 F.Supp, 33 (M.D.Pa. 1989), *aff'd* 902 F.2d 1558 (3rd Cir. 1989); *Angus v. Shiley, Inc.*, 989 F.2d 142 (3rd Cir. 1993).

On January 23, 1992, the *Bowling* case was conditionally certified as a Rule 23(b)(3) opt-out class action by the district court. (R. 48: Order Certifying The Conditional Settlement Class And Scheduling A Fairness Hearing).

In January, 1992, class counsel and counsel for defendants entered into a proposed settlement agreement. Subsequent to the issuance of appropriate notice to the class, the proposed settlement agreement was the subject of fairness hearings before the district court on June 5, 8, 9, 1992 and July 22, 1992. In accordance with the notice provided the class, any class member who wished to participate during the hearings was permitted to do so. The Court also permitted non-class members claiming an interest in the outcome to participate, including the representatives of consumer groups. As indicated by the transcripts of proceedings (R. 202: Transcript Of Fairness Hearing; R. 207: Transcript Of Fairness Hearing; R. 208: Transcript Of Fairness Hearing; R. 224: Transcript Of Fairness Hearing; and R 251: Transcript Of Fairness Hearing), the district court heard from more than forty different American and foreign counsel and individuals, as well as considering written communications to the Court by class members who could not be present. A multitude of individuals participated vigorously in the process. No person who desired to be heard was refused.

By electing to opt-out, class members did *not* waive their opportunity to be heard or to object to the proposed class settlement. Petitioners' assertion to the contrary is untrue. *Bowling*, 143 F.R.D at 155-56. During a May 19, 1992 status conference, prior to the fairness hearings and prior to the date petitioners were to elect whether to opt-out, all attendees, including petitioners, were specifically informed of this by the district court. (R. 122: Civil Minutes at p. 28).

Petitioners received class notice of the *Bowling* settlement in February, 1992, and the complete text of the proposed agreement was available for their inspection. On February 26, 1992, less than one month after the proposed settlement had been reached, petitioners provided the state court with a status report wherein petitioners advised the state court of the *Bowling* proposed settlement and indicated that petitioners were meeting with defendants regarding the terms of the settlement. (R. 255: Second Supplemental Memorandum By Defendants In Support Of Settlement, Ex. 1). Moreover, the district court granted petitioners' request for written discovery of the terms of the settlement from class counsel and defendants prior to the fairness hearings.

Petitioners were given three opportunities to opt-out of the *Bowling* settlement. Yet, petitioners each time affirmatively elected to remain within the *Bowling* settlement class. (R. 224: June 9, 1992, Transcript of Proceedings, at pps. 92-95; R. 251: July 22, 1992, Transcript of Proceedings, at p. 83).

On August 19, 1992, the District Court issued a sixty-eight page Order Finding The Proposed Settlement To Be Fair. *Bowling*, 143 F.R.D. 141. On September 10, 1992, the District Court entered its Judgment Certifying The Settlement Class And Approving The Class Settlement. (R. 255).

On September 17, 1992, petitioners filed their notice of appeal to the Court of Appeals for the Sixth Circuit. (R. 258). Petitioners were the only class members to appeal the district court's rulings. Petitioners did not seek to intervene prior to

filing a notice of appeal.[3] Petitioners' assertion that the district court gave every indication that intervention was *not* required is unjustifiable and unfounded.

On September 25, 1992, petitioners filed a belated motion to intervene in the district court, despite the fact that the filing of the notice of appeal had already divested the district court of jurisdiction. By memorandum decision dated November 9, 1992, the district court determined that it would not decide the motion to intervene. Petitioners appealed from the district court's memorandum decision also.

On March 2, 1993, while petitioners' appeal was pending, petitioners' filed a motion under Fed.R.Civ.P. 60(b) requesting the district court reconsider its approval of the class settlement. (R. 315). By Order dated March 26, 1993, the district court concluded there was no basis to request a remand from the Court of Appeals for a multitude of reasons including that some of the matters raised in the motion were already considered by the court in approving the settlement; many of the allegedly "newly discovered" matters were actually known by petitioners, or with reasonable diligence could have been dis-

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[3] The position taken by petitioners in their appeal is completely contrary to that taken by their counsel in a hearing before state court Judge Lord in *Taylor v. Shiley* on December 29, 1992. Exhibit C-1 to the transcript of that hearing (R. 334) indicates that petitioners' counsel applauded the *Bowling* settlement from the standpoint of his three clients:

> [A]lthough our clients were offered the opportunity to opt [out] of the *Bowling* case, they elected to stay in the case and obtain the benefits of the *Bowling* settlement . . . One of our clients has been identified as a candidate for a re-operation, which means that her Pfizer heart valve would be removed and a new heart valve implanted. Under the *Bowling* settlement, this client could expect to receive substantial compensation and to thus be able to afford the procedure. Accordingly, the prospect of waiting many, many years for a resolution of the *Taylor* case, compared to the relief provided by a prompt implementation of the *Bowling* settlement was something that the client considered. The other client who has a working heart valve is also in a fragile state of health.

covered at the time of the fairness hearing, or were actually discussed at the fairness hearing; much of the "newly discovered evidence" consisted of newspaper articles; and when the court held its fairness hearing, it was well aware that some plaintiffs' counsel had accused the defendants of "fraud" with respect to the causes of action underlying the case, and it took this accusation into account when it approved the settlement. (R. 335). Petitioners appealed. (R. 337). On June 9, 1993, the Sixth Circuit dismissed the appeal because the district court's order declining to request a remand from the Court of Appeals was not an appealable order.

On December 21, 1993, the Sixth Circuit issued two Orders. The first Order affirmed the district court's determination that it lacked jurisdiction to rule on the motion to intervene while petitioners' appeal was pending. (Pet. App. at 10a).

The second Order dismissed the principal appeal. Citing to *Guthrie v. Evans,* 815 F.2d 626, 627-28 (11th Cir. 1987), *Croyden Associates v. Alleco,* 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied,* 113 S.Ct. 1251 (1993), and *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988), the Court of Appeals held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." (Pet. App. at 7a). Petitioners then petitioned for rehearing *en banc*, relying upon *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942) and an alleged inconsistency between *Cohen* and the more recent unpublished decisions of the Sixth Circuit. Respondents were asked to file a response, addressing these specific allegations, and did so.

On March 4, 1994, the Court of Appeals denied the petition for rehearing *en banc,* noting that the petition had been circulated among all active judges of the Sixth Circuit, and that "no judge . . . requested a vote on the suggestion for rehearing en banc." The Court further stated that the original hear-

ing panel had "further reviewed the petition for rehearing and [had] conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." (Pet App. at 8a). Petitioners then filed a Petition for Writ of Certiorari, No. 93-1912, with the Supreme Court of the United States, presenting the question of whether unnamed, nonintervening class members have standing to appeal from a judgment approving a class settlement. The petition was denied on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S.Ct. 294 (1994). Upon denial of the petition, the judgment approving the class settlement became final, and the district court instituted implementation of the settlement agreement.

Prior to the filing of the aforementioned petition and during the time period the district court regained jurisdiction, the district court ruled upon petitioners' pending motions. On April 5, 1994, the court denied petitioners' motion to intervene "because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class." (Pet. App. at 6a). Petitioners did not appeal from the order denying intervention. Instead, on April 13, 1994, they filed a motion in the district court under Fed.R.Civ.P. 59(e) for reconsideration of the denial of their motion to intervene. (R. 371).

On April 12, 1994, the district court denied petitioners' Rule 60(b) motion stating, "This complex and far-reaching settlement agreement was approved after exhaustive consideration and after the Court conducted fairness hearings on June 5, 8 and 9, 1992 and July 22, 1992. We have now thoroughly reconsidered our decision approving this settlement and conclude that after careful review of the Objectors' motion, and further review of our 68 page Order approving the settlement, we hereby conclude that the interest of justice dictates that the Objectors' motion be, and is hereby, denied." (Pet. App. at 5a). On May 3, 1994, petitioners filed a notice

of appeal from that decision. On August 8, 1994, the Sixth Circuit dismissed the petitioners' appeal upon the basis that petitioners were nonparty class members who were denied intervenor status, who were already found by the Court of Appeals to lack standing to appeal the settlement, and who likewise lacked standing to appeal the denial of their Rule 60(b) motion whereby they sought once again "to vacate the very settlement as to which this court earlier concluded the appellants lacked standing to challenge". (Pet. App. at 1a, 2a). The instant petition stems from this determination of the Court of Appeals for the Sixth Circuit.

SUMMARY OF REASONS FOR DENYING THE WRIT

A substantially identical petition, filed by the instant petitioners, was denied by this Court on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S.Ct, 294 (1994), Petitioners have already been found to be nonparty, nonintervening class members who lack standing to appeal.

The primary question presented by the petition was resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988).

The facts underlying this petition are so unusual and particular to this matter that the case is not suitable for review by the Supreme Court, to wit: the nonparty, nonintervening petitioners are the sole class members seeking to overturn a class settlement, which is now final and being implemented; it has already been determined, with finality, that petitioners lack standing to appeal; the settlement petitioners seek to overturn is one in which petitioners affirmatively elected to participate after being given three opportunities to opt-out; and petitioners have their own separate lawsuit (*Taylor v. Shiley*) pending against defendants in a Pennsylvania state court.

Petitioners' argument that dismissal of their appeal violated their constitutional right to due process is meritless, and is based upon a misinterpretation of 28 U.S.C. Section 1291.

REASONS FOR DENYING THE WRIT

1. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED ESTABLISHED PRINCIPLES OF APPELLATE PROCEDURE ESTABLISHED BY THIS COURT AND CONSISTENTLY APPLIED BY THE COURTS OF APPEAL.

The question presented for a second time by petitioners has already been resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988).[4] Therein, the Court specifically and conclusively held that only individuals who are parties, or those who properly become parties, may appeal an adverse judgment. Citing to *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) (appeal from denial of class action certification), this Court also rejected the suggestion made by the Second Circuit that there could be exceptions to this rule, finding instead that a nonparty is to seek intervention for purposes of appeal.

Subsequent to *Marino*, every Court of Appeals presented with an appeal from a class action judgment brought by nonparty class members has ruled that such do not have standing to appeal. *Shults v. Champion International Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v Alleco*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).

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[4] The petition for writ of certiorari is in large measure a verbatim restatement or petitioners' previous certiorari petition (No. 93-1912), which this Court denied.

Petitioners' argument that there is a "split" among the circuits as to the issue of a nonparty class member's standing to appeal a judgment approving a class settlement is unfounded. No Court of Appeals presented with this issue has declined to follow the holding of *Marino*.

Petitioners rely primarily upon decisions rendered prior to *Marino*. While petitioners cite to three cases decided after *Marino*, none stand for the proposition asserted by petitioners. In *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992), a nonparty class member was found not to have standing to appeal a post-settlement order implementing a settlement agreement. In *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3rd Cir. 1993), nonparty class members appealed from a denial of their motion to intervene. The appeal was dismissed by the Third Circuit upon the basis that the appeal was interlocutory in nature and not immediately appealable. Thus, the factual and procedural circumstances present in *Carlough* were far different than those of the instant petition wherein petitioners neglected to intervene prior to appealing a final judgment approving a class settlement. *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993) was a shareholders' derivative suit, not a class action, and therefore "inapposite". *Gottlieb*, 11 F.3d at 1010-11 (10th Cir. 1993). Indeed, *Bell Atlantic* itself stated that "one of the rationales offered in support of an intervention requirement cannot apply to derivative actions" because "unlike members of a class certified under Rule 23(b)(3), 'shareholders normally cannot opt out of the class and pursue their own individual action.' " *Bell Atlantic*, 2 F.3d at 1308 n.4 (citation omitted).

The supposed "split" among the circuits, argued by petitioners, is nonexistent. *Gottlieb*, 11 F.3d at 1009. Subsequent to this Court's decision in *Marino*, the Courts of Appeal have uniformly held that non-party class members do not have standing to appeal from a judgment in a class action absent a grant of intervention.

The decision below is supported by the language and underlying policies of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. In *Marino*, this Court relied upon the text of the Federal Rules of Appellate Procedure in holding that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." 484 U.S. at 304. As the Court stated, Fed.R.App.P. 3(c) specifically requires that the notice of appeal specify the "party or parties" taking the appeal. *Id.*

The Sixth Circuit's decision, from which certiorari is sought, is also supported by the language of the class action and intervention provisions of the Federal Rules of Civil Procedure. Unnamed individual class members cannot represent the class absent the procedures provided for in Fed.R.Civ.P. 23, for neither plaintiffs nor counsel can represent a class absent a district court's finding on issues such as adequacy of representation. Second, class members who disagree with the course of a class action have adequate procedures available to them, such as collateral attack, through which they can protect their interests. Procedures applicable include intervention and the right to opt-out of a case designated as a Rule 23(b)(3) class action.[5] Third, class actions would become unmanageable and non-productive if each member could individually decide to appeal, thereby defeating the very purpose of class action lawsuits. *See, Croyden*, 969 F.2d 675; *Walker*, 858 F.2d 1071; *Guthrie*, 815 F.2d 626.

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[5] The "opportunity to opt-out after knowing the terms of a proposed settlement is unusual in the class action context and serves to protect the interests of class members." *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977). Class members are in an advantageous position because "they [know] the terms of the settlement before having to decide whether to opt out." *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 175 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (in making an opt-out decision, settlement class members "can benefit from the specific knowledge of the amount of recovery they can expect from remaining in the class".).

In addition to the foregoing, it must be pointed out that petitioners did not have standing to file their initial Rule 60(b) motion with the district court, which was predicated specifically on subsections (2), (3) and (6) thereof. Petitioners did *not* assert reliance upon that separate provision of Rule 60(b) which permits a judgment to be set aside for "fraud upon the Court". *Broyhill Furniture v. Craftsmaster Furniture*, 12 F.3d 1080, 1085 (Fed.Cir. 1993). It is clear that the relief requested by petitioners may only be sought by, and granted to, "a party or a party's legal representative". *See, In re Lovitt*, 757 F.2d 1035, 1040 (9th Cir, 1985), *cert. denied*, 106 S.Ct. 145 (1985); *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834, 844 (10th Cir. 1974). Cases cited by petitioners do not support a holding to the contrary. Furthermore, lack of standing constitutes a lack of jurisdiction. *Bender v Williamsport Area School Dist.*, 106 S.Ct. 1326, 1327 (1986).

II. THE UNIQUE AND UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW BY THIS COURT.

The petition is unsuitable for review by this Court, due to the unique and unusual facts of this case, to wit: it has already been determined, with finality, that petitioners lack standing to appeal; petitioners seek to overturn a class settlement which they affirmatively elected to join after being given three opportunities to opt-out; petitioners had, and still have, their own separate lawsuit against defendants (*Taylor*) pending in the Pennsylvania state court; petitioners seek to overturn a class settlement which petitioners characterized to the Pennsylvania state court as one which provided petitioners with substantial, necessary, needed benefits and compensation; petitioners are the only class members seeking to overturn a class settlement which was acceptable to class representatives and all other members of the class; and peti-

tioners seek to overturn a class settlement which is now final and being implemented.

III. PETITIONERS' "DUE PROCESS" ARGUMENT IS MERITLESS.

Petitioners argue that dismissal of their appeal violated their constitutional right to due process of law. Relying upon 28 U.S.C. Section 1291, petitioners assert that they have a statutory right to appeal regardless of standing. Petitioners' reliance is misguided, for that statute grants appellate jurisdiction to the courts of appeal, not an absolute right to appeal regardless of standing.

Petitioners also assert that they had a right to rely upon pre-*Marino* rulings of the Court of Appeals for the Sixth Circuit on the issue of standing to appeal.[6] But petitioners' interpretation of those cases was rejected by the Sixth Circuit in *Shults*.

Petitioners state that the district court led them to believe that intervention was unnecessary and that the district court treated them as *de facto* intervenors. There is no support for such an argument. Petitioners were treated as objecting class members, and nothing more. Moreover, petitioners were treated in the exact manner as the district court treated objecting non-class members, and any other interested individuals or entities, who were permitted to fully participate in the fairness hearing process. The district court never indicated that it considered petitioners to be intervenors, or parties. Assertions to the contrary are simply untrue.

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[6] *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972).

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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DATED: December 8, 1994

(4)

Supreme Court, U.S.
FILED
DEC 30 1994
OFFICE OF THE CLERK

No. 94-843

In the

Supreme Court of the United States

October Term, 1994

ELIZABETH RIDGEWAY, et al.,

Petitioners

vs.

PFIZER, INC., et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF IN OPPOSITION

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14

TABLE OF CONTENTS

PAGE

ARGUMENT 1

RESPONDENTS' ARGUMENTS AGAINST THE GRANT OF CERTIORARI ARE NOT VALID . 1

1. Respondents argue that the ends justify the means 1

2. Respondents argue that a 23(b)(3) class member may object at the district court level to the class certification procedure and the procedure used by the district court in certifying a class and approving a settlement, but the class member has no right to appeal the district court's decision, even if the district court committed egregious errors 3

3. Respondents argue that because the injustice visited upon petitioners by the Sixth Circuit was so great, it is not likely that any other litigants will be forced to follow the circuitous procedures imposed by the Sixth Circuit, and therefore, this case is unique and not worthy of Supreme Court review 5

4. Respondents argue that as long as a court below accepts their distortion of the record below, respondents have a license to repeat that distortion as if it were fact 6

5. Respondents argue that class members should have had a crystal ball to tell them intervention is a requirement for objecting to a class certification and settlement, and that it is not necessary to provide in a notice to the class a warning that if class members do not formally intervene, whatever decision the district court might make will be binding, and unappealable 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES:

Bowling v. Pfizer, 143 F.R.D. 141 (S.D. Ohio 1992) . 6, 7, 9

Cohen v. Young, 127 F.2d 721 (6th Cir. 1942) 8

Sertic v. Cuyahoga Lake, Etc., Carpenters District Council, 459 F.2d 579 (6th Cir. 1972) 8

Taylor v. Shiley, Court of Common Pleas, First Judicial District of Pennsylvania Civil Trial Division (Philadelphia) February Term, 1986, No. 2087 . . 6, 7

RULES:

Fed.R.Civ.P. 1 9

Fed.R.Civ.P. 23 . . . . . 1, 2, 3, 6, 9

Fed.R.Civ.P. 23(a)(4) 2, 3

Fed.R.Civ.P. 23(b)(3) 2, 3, 5, 6, 7, 8, 9, 10

Fed.R.Civ.P. 23(c)(2) 3

ARGUMENT

RESPONDENTS' ARGUMENTS AGAINST THE GRANT OF CERTIORARI ARE NOT VALID

Respondents' position boils down to the following arguments:

1. Respondents argue that the ends justify the means.

In the district court, evidence was presented establishing that the attorney for plaintiffs and the putative class (known herein as "CC") and defendants (known herein collectively as "Pfizer") colluded to achieve a settlement which won for Pfizer the elimination of tens of thousands of lawsuits based on Pfizer's defectively manufactured heart valve, and on the other hand, was calculated to provide CC with attorneys' fees in excess of $20,000,000.00. The vehicle used to accomplish these goals was the federal court and Fed.R.Civ.P. 23. The steps taken were (a) a friendly class action was filed by Pfizer's hand-picked lawyer for the plaintiffs, CC; (b) CC then forum shopped until he found a judge that he expected to not scrutinize the collusive aspects of the settlement; and, (c) the case was settled on terms that were favorable for Pfizer, but which were dressed up to appear beguiling to provide substantial benefits to the class that were much less than advertised.[1]

The case was settled with virtually no discovery having been undertaken by CC on the merits or on whether the supposed relief to the class was needed, was appropriate or was a fair trade-off for the causes of action the class members were forced to sacrifice. Moreover, CC and Pfizer insulated

[1] Confusing settlement funds, which through the use of *mumbo jumbo* in the notice to the class, created the false impression that class members are receiving benefits which they actually will not receive.

the settlement from early attacks by inducing the district court to seal the record in the case of a private conference between the court, CC and Pfizer where the settlement was discussed prior to notice, and by CC's and Pfizer's conduct in patently misleading the district court, and contravention of the requirements of Fed.R.Civ.P. 23(b)(3) about the existence of numerous other actions pending, including petitioners' putative class action pending in the State Court of Pennsylvania.

Once the district court approved the notice to the class drafted by Pfizer and CC, the district court became a militant protector of the settlement instead of a fiduciary seeking to protect the rights of absent class members. The district court thus prohibited any class member from making an *evidentiary* record about the fraud and collusive nature of the settlement, and likewise, refused to allow any evidentiary record to be made about the inadequacy of CC as the representative of the absent class members, notwithstanding the requirements of Rule 23(a)(4). In its ruling approving the settlement, the district court openly and unabashedly conceded that it was disregarding the protections provided by Rule 23 and embraced instead the view that if a class member did not like the settlement from what was disclosed in the notice to the class, his sole remedy is to withdraw from the class before the fairness hearing started or he should go along with whatever the appointed class counsel and settling defendant determine should be in the settlement.

The district court abrogated its responsibility to supervise the conduct of the proponents of a class settlement, and instead read Fed.R.Civ.P. 23(b)(3) as a license to transform the federal courts into a hotel which offers lodging to efforts by defendants being sued by thousands of consumers to unilaterally put an end to such mass litigation. On this record, respondents now argue that this court should deny review because

the settlement is adequate and class members have been waiting for the benefits of the settlement while the appeals were being decided. Respondents argue in essence that their fraud in procuring the settlement should be excused, and the violations of Fed.R.Civ.P. 23 (and the rights of the class members) pardoned.

2. Respondents argue that a 23(b)(3) class member may object at the district court level to the class certification procedure and the procedure used by the district court in certifying a class and approving a settlement, but the class member has no right to appeal the district court's decision, even if the district court committed egregious errors.

None of petitioners' appeals involved the actual merits of the settlement, although the settlement was in fact inadequate and unjustifiably favorable to Pfizer. Instead, from the time that petitioners first objected in the district court, through all of the appeals, petitioners have contended consistently that the district court erred in certifying the class and that it erred again in the procedure it used to approve the settlement. Because this is a Rule 23(b)(3) class action, petitioners had standing under Fed.R.Civ.P. 23(c)(2) to have their attorney enter an appearance and to participate in the settlement approval proceedings. Rule 23(b)(3) also gives petitioners standing to complain that CC did not satisfy the requirements of Rule 23(a)(4) and that the class did not satisfy the requirements of Rule 23(b)(3).

The district court complied in form with the requirements of Fed.R.Civ.P. 23(c)(2) when it allowed petitioners to participate as parties in the settlement approval proceedings, and to object to the class certification and the settlement. This is not a case where petitioners were merely dissatisfied with the amount of the recovery they would receive as class mem-

bers. Instead, in the district court, petitioners concentrated their arguments mainly on the fraud and collusion on the part of CC and Pfizer, and they objected to the district court's procedure, which essentially consisted of the district court's acceptance of whatever CC and Pfizer proposed on the one hand coupled with the court's adamant refusal to allow an evidentiary record to be made so that an appellate court could determine if the district court had erred. On appeal, petitioners have sought review only of the district court's procedural rulings.

Petitioners have *never* received any appellate review of their objections to the way the district court handled the class certification and the process of approving the settlement. The Court of Appeals for the Sixth Circuit actually ignored the nature of petitioners' appeals, and lumped this case improperly together with cases where class members were challenging the value of the benefits of a class settlement. The Sixth Circuit thereby avoided petitioners' challenge to the integrity of the proceedings below, and instead, the Sixth Circuit used its raw power to summarily dismiss appeals.

Respondents paint petitioners as being fanatics. In truth, the need for petitioners to run back and forth from one court to another, and for there to have been numerous appeals, resulted solely from the Sixth Circuit's insistence that the issues be presented to it in a piecemeal fashion. The Sixth Circuit rejected each effort by petitioners to consolidate the appellate proceedings. A careful review of the proceedings below establishes that at all times petitioners have sought to take the most efficient and conservative approach, but at each turn were rebuffed, with the result that petitioners were forced to spend great sums of money and time in prosecuting separate appeals, and in filing separate motions in the courts below, when all petitioners wanted was for the Sixth Circuit to

review the merits of their objections to the procedures used by the district court in certifying the class and approving the settlement.

3. Respondents argue that because the injustice visited upon petitioners by the Sixth Circuit was so great, it is not likely that any other litigants will be forced to follow the circuitous procedures imposed by the Sixth Circuit, and therefore, this case is unique and not worthy of Supreme Court review.

Respondents use as a weapon the Sixth Circuit's refusal to remediate the very circumstances it created when it forced petitioners to file separate appeals and separate motions in the court below relating to the one overriding issue pressed by petitioners: did the district court err in certifying the class and in the procedure the district court used in certifying the class and approving the settlement.

While respondents have a valid point when they argue that few cases will produce the convoluted record that was created in the courts below, respondents err when they seek to diminish the precedential value this case will have if certiorari is denied. In fact, a new rule of law has emerged from this case, and unless certiorari is granted, the protections designed by Rule 23(b)(3) will be rendered meaningless. The precedent flowing out of this case may be stated as follows:

> A defendant that makes a product that injures people around the world, and thus faces lawsuits throughout the United States and the world may *preemptively* terminate this mass litigation by finding a friendly class counsel (and court) and having a collusively obtained class settlement rubber stamped; and class members may object to this collusive settlement at the district court level, but

cannot appeal the district court's approval of its own rulings.

In light of the fact that most members of a consumer-based-Rule 23(b)(3)-class action are not trained in the law, and therefore, would not know the implications described in the abbreviated notice that usually is sent to class members, a defendant in one fell swoop, could virtually end its exposure to massive liability at a fraction of the sum it would owe to the consumers if the collusive class action and settlement were not permitted. Under the precedent of this case, the court's role has been changed from fiduciary with a duty to protect class members to that of host for the settling defendant and its cooperative, class counsel, who will be rewarded handsomely for acting as the agent of the settling defendant. Any class member who objects is now obliged to hire an attorney and file a motion to intervene in the case formally or the objecting class member will have no standing to appeal the process used by the court to accommodate the company and its chosen class counsel. Rule 23 was never intended to provide this benefit to companies or to their allies, the fortune hunting class counsel. It likewise was not designed to burden class members with formal intervention as a requirement of obtaining appellate review.

4. Respondents argue that as long as a court below accepts their distortion of the record below, respondents have a license to repeat that distortion as if it were fact.

Respondents repeat *ad nauseam* that petitioners' remedy was to opt out of the *Bowling* settlement. *Bowling v. Pfizer,* 143 F.R.D. 141 (S.D. Ohio 1992). Petitioners did not have such a remedy because petitioners are class representatives of a putative class still pending in *Taylor v. Shiley,*[2] a class action

[2] *Taylor v. Shiley,* Pennsylvania Court of Common Pleas No. 2087, Philadelphia County, February Term, 1986.

filed in the Pennsylvania State Court. The class in *Taylor* consists of 10,000 putative class members with a nexus to Pennsylvania who are all also members of the class in *Bowling*. If petitioners had not been the named class plaintiffs in *Taylor*, they would have been free to opt out as individuals from the settlement in *Bowling*. However, if petitioners had opted out of *Bowling*, the 10,000 putative class members in the *Taylor* class would have lost their representation in the *Bowling* settlement-approval-proceedings, and would have been stampeded into the impecunious *Bowling* settlement. The conditions proffered by CC and Pfizer, and ordered by the district court, required petitioners to choose between opting out and prosecuting their individual claims (and thereby abandoning the 10,000 putative class members in the *Taylor* case), or sacrificing the possibility of litigating their individual claims in the *Taylor* proceeding if the *Bowling* settlement were approved, but establishing the requisite standing for raising objections in the *Bowling* class action and settlement.[3]

Accordingly, petitioners had no choice due to the fiduciary duty that they owed as the class representatives of their putative class in *Taylor* to pursue their objections to the class certification and class settlement in *Bowling*, and petitioners were therefore obligated to refrain from opting out of the *Bowling* class action.

Respondents, therefore, distort the record by making it appear as if petitioners had the choice of opting out or staying in the *Bowling* class. More importantly, Fed.R.Civ.P. 23(b)(3) is not designed to work the way respondents and the courts below suggest. The Rule does not authorize collusive class certifications and settlements. If anything, the Rule is de-

[3] If the *Bowling* settlement were properly approved, by not opting out, petitioners would be bound by the terms of the *Bowling* settlement. On the other hand, if petitioners opted out of the *Bowling* settlement, they would not be bound by it.

signed to require the district court to ensure that only proper classes are certified, and only fair, legitimate class settlements are achieved. The Rule does not contemplate a *free market* system where class members, on the strength of the abbreviated disclosure in the notice to the class, must make a decision to "buy-in" and waive conditions set forth in the objections, or opt out and lose standing to object. If the courts below and respondents are correct in their interpretation of Rule 23(b)(3), there would be no need for the court to approve the settlement of a class action.

5. Respondents argue that class members should have had a crystal ball to tell them intervention is a requirement for objecting to a class certification and settlement, and that it is not necessary to provide in a notice to the class a warning that if class members do not formally intervene, whatever decision the district court might make will be binding, and unappealable.

The district court ordered that a notice be sent to the class that stated as a condition of participation in the Fairness Hearing that each class member must file written objections within a specified time period. Petitioners, through their counsel, complied with the notice. Thereafter, the district court established additional conditions for participation in the Fairness Hearing with which petitioners' counsel complied fully. There was nothing mentioned in the notice to the class or in any of the district court's proceedings that in order to appeal decisions of the district court, it would be necessary for class members to file a formal motion for intervention, Moreover, in light of existing precedent in the Sixth Circuit, such a motion would have been superfluous.[4]

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[4] *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972).

Argument

The new rule now announced by the Sixth Circuit is that every absent class member in a Rule 23(b)(3) class action must intervene formally upon receipt of the notice of the class settlement, or the class member will have no standing to appeal any decision that the district court might make concerning the class certification and settlement and approval. In other words, the 50,000 or more class members who received notice in the *Bowling* case, although not told by the notice that intervention was a requirement, all were obliged to file formal motions to intervene if they wished to preserve their rights to seek review of the district court's procedural and substantive rulings. It is hard to believe that the framers of Rule 23 had such a cumbersome procedure in mind when the Rule was promulgated.

CONCLUSION

Petitioners seek only to have the procedural rulings of the district court reviewed on appeal. The *Kafkaesque* approach embraced by the district court and the Sixth Circuit has been designed to wear out petitioners, and to cause the expense of seeking to obtain even a single appellate decision that considers the merits of the district court's rulings, to be out of the reach of petitioners. The view in the courts below has been that the ends justify the means. Perhaps this will become the new motto of the federal courts, but if so, it is wrong,

The ruling of the Sixth Circuit in this case has wide-ranging implications to millions of future litigants, and it must be corrected. The current status of the law in the Sixth Circuit and possibly in other circuits is that all absent class members must become formal parties, through the cumbersome, litigious and expensive process of formal intervention or class members in a 23(b)(3) class action will have no standing to appeal any decision affecting their rights. This contradicts the mandate of Fed.R.Civ.P. 1, and it stands Rule 23 on its head.

This court must grant certiorari to rectify this far reaching and patently absurd interpretation of the standing of absent Rule 23(b)(3) class members to appeal, and indeed, even participate in hearings called to determine class certification and settlements.[5]

Respectfully submitted,

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Date: December 30, 1994

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[5] Under the logic of the Sixth Circuit's ruling, a class member who had no standing to appeal the district court's overruling of his proper objections to a class certification and approval of a settlement should likewise have no standing to even make the objections in the first place. If this is good law, why go to the trouble of conducting a Fairness Hearing; the district court would be unaccountable to any appellate court, and its determination that it acted properly would be final and binding.